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# A Survey of Principal Procedural Elements among State Administrative Procedures Acts


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## NOTES

### *A Survey of Principal Procedural Elements Among State Administrative Procedure Acts*

THE AREA OF STATE ADMINISTRATIVE LAW, relatively contemporary in origin,<sup>1</sup> has undergone tremendous expansion and now encompasses a considerable body of common law as well as statutory enactments. As Mr. Justice Jackson has said, "The rise of administrative agencies has probably been the most significant legal trend of the last century."<sup>2</sup> Concurrent with the rise in the number of agencies has been the recent enactments of, and amendments to, state administrative procedure acts.<sup>3</sup> In view of the increasing amount of case law and commentary in the field of administrative law, this note confines itself to a survey of several of the principal procedural elements commonly found in state administrative procedure acts.

The practical application of any administrative procedure statute involves a consideration of at least the following principal procedural elements: rule making, agency subpoena power, discovery devices, hearing procedure for contested cases, the record thereof, agency enforcement power, stay pending appeal, standing to obtain judicial review, scope of judicial review, further judicial appeal, and criminal or civil liability of administrators.

Although the administrative procedure acts reviewed, in general, contain considerably more provisions than those listed above, it is specifically because of the breadth of the area of state administrative law that this note will consider only the aforementioned procedural elements, respectively.

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<sup>1</sup> 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 7 (1965).

<sup>2</sup> *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (*dissenting opinion*).

<sup>3</sup> This article concerns itself with the following state administrative procedure acts: ALAS. STAT. §44.62.010 *et seq.* (1962); ARIZ. REV. STAT. ANN. §§12-901 *et seq.*, 41-1001 *et seq.* (1956); ARK. STAT. ANN. §5-701 *et seq.* (Supp. 1971); CAL. CIV. PROC. CODE §1094.5 *et seq.* (1955); CAL. GOV'T. CODE §11500 *et seq.* (1966); COLO. REV. STAT.

(Continued on next page)

## Rule Making

### *Review of Regulations After Promulgation*

Of the state statutes reviewed in this section, all but Missouri's and Iowa's provide for notice and a hearing of some type prior to promulgation by the agency of an administrative regulation or rule.<sup>4</sup> In Missouri, the regulation becomes effective ten days after filing,<sup>5</sup> and Iowa screens the regulation through that state's attorney general and the departmental rules review committee which is composed of members of the state senate and house.<sup>6</sup> But what happens after the rule or regulation has been filed and become effective? Can it be repealed or amended? How and by whom? The primary portion of this section will be devoted to providing the answers to these questions.

Because one of the criteria used by courts to determine the validity of an administrative rule or regulation is the sufficiency of the justification for the exercise of the emergency rule making procedure,<sup>7</sup> it is important to review the procedures for emergency promulgation found in the state administrative procedure acts. As the name implies, emergency regulations are put into effect when

(Continued from preceding page)

ANN. §3-16-1 *et seq.* (1964); CONN. GEN. STAT. ANN. §4-41 *et seq.* (1969); D.C. CODE ANN. §1-1501 *et seq.* (Supp. 1970); FLA. STAT. ANN. §120.011 *et seq.* (1973); GA. CODE ANN. §3A-101 *et seq.* (1968); HAWAII REV. STAT. §91-1 *et seq.* (1968); IDAHO CODE §67-5201 *et seq.* (Supp. 1969); ILL. ANN. STAT. ch. 110, §264 *et seq.* (1968), ch. 127 §263 *et seq.* (1967); IND. STAT. ANN. §§60-1501 *et seq.*, 63-3001 *et seq.* (1962); IOWA CODE ANN. §17A.1 *et seq.* (1967); KAN. STAT. ANN. §77-415 *et seq.* (1969); KY. REV. STAT. §13.075 *et seq.* (1971); LA. REV. STAT. §49:95 *et seq.* (Supp. 1972); ME. REV. STAT. ANN. tit. 5, §2301 *et seq.* (1964); MD. ANN. CODE art. 41, §244 *et seq.* (Supp. 1972); MASS. LAWS ANN. ch. 30A, §1 *et seq.* (1966); MICH. COMP. LAWS §24.201 *et seq.* (Supp. 1972); MINN. STAT. ANN. §15.01 *et seq.* (1967); MO. ANN. STAT. §536.010 *et seq.* (1953); MONT. REV. CODES ANN. §82-4201 *et seq.* (Supp. 1971); NEB. REV. STAT. §84-901 *et seq.* (1971); NEV. REV. STAT. §233B.010 *et seq.* (1971); N.J. STAT. ANN. §52:14B-1 *et seq.* (1970); N.M. STAT. ANN. §4-32-1 *et seq.* (Supp. 1971); N.D. CENT. CODE §28-32-01 *et seq.* (1960); OHIO REV. CODE ANN. §119.01 *et seq.* (Page 1969); OKLA. STAT. ANN. tit. 75, §301 *et seq.* (1965); ORE. REV. STAT. §183.310 *et seq.* (1969); PA. STAT. ANN. tit. 71, §1710.1 *et seq.* (1962); R.I. GEN. LAWS §42-35-1 *et seq.* (1970); S.D. COMPILED LAWS ANN. §1-26-1 *et seq.*, 21-33-1 *et seq.* (Supp. 1972); VT. STAT. ANN. tit. 3, §801 *et seq.* (1972); VA. CODE ANN. §9-6.1 *et seq.* (1964); WASH. REV. CODE ANN. §34.04.010 *et seq.* (1965); W. VA. CODE ANN. §29A-1-1 *et seq.* (1971); WIS. STAT. ANN. §227.01 *et seq.* (1957); WYO. STAT. ANN. §9-276.19 *et seq.* (Supp. 1971). In view of the large number of statutory citations contained in this note, the aforementioned state administrative procedure acts will hereinafter be cited by state and section only (e.g., KY. §13.125) unless otherwise necessary.

<sup>4</sup> ALAS. §§44.62.190, 44.62.200, 44.62.210; ARIZ. §41-1002; ARK. §5-703; CAL. GOV'T. CODE §§11423, 11425; CONN. §§4-42, 4-43; D.C. §1-1505; FLA. §120.041; GA. §3A-104; HAWAII §91-3; IDAHO §67-5203; IND. §60-1504; KAN. §77-421; KY. §13.125; LA. §49:953; ME. §§2351, 2354; MO. Art. 41 §9, Art. 41 §245; MASS. ch. 30A §82, 3; MICH. §24.241; MONT. §82-4200; NEB. §84-907; NEV. §233B.060; N.J. §52:14B-4; N.M. §4-32-4; MINN. §15.0412; OHIO §119.03; OKLA. tit. 75 §303; ORE. §183.335; R.I. §42-35-3; S. DAK. §1-26-4; VT. tit. 3 §803; VA. §9-6.4; WASH. §34.04.025; W. VA. §29A-3-2, §29A-3-3; WIS. §227.015; WYO. §9-276.21.

<sup>5</sup> MO. §536.020.

<sup>6</sup> IOWA §17A.2.

<sup>7</sup> See Declaratory Judgment, *infra*, pages 289-91.

conditions require immediate effectiveness without the notice and hearing required in the ordinary promulgation process. Of the acts covered, only four do not have provisions for emergency promulgation;<sup>8</sup> all the rest have some process by which the usual requirements of notice and hearing can be bypassed.<sup>9</sup>

The requisite conditions necessary to invoke an emergency procedure vary considerably. Some acts, such as those in Connecticut, Ohio, Nebraska, and Minnesota allow broad discretion on the part of agencies or the executive of the state to invoke the emergency process. In Ohio and Nebraska the governor may invoke the emergency powers if he determines there is a need for them, while in Minnesota an agency, if the statute governing the agency permits, may exercise its emergency powers whenever it feels a need to do so.<sup>10</sup> Connecticut also allows an agency to use its emergency procedure if it finds an emergency exists. Cooper, in his treatise, *State Administrative Law*, expresses the fear that this short circuiting could become abused and agencies might start invoking their emergency powers when in fact no emergency exists.<sup>11</sup>

The usual rationale for invoking emergency rule making procedures is that the rule is necessary to preserve or to protect from imminent peril the public health, safety, or welfare.<sup>12</sup> Even with this limitation the agency has wide discretion in using the emergency procedure, because as the following two cases illustrate, there seems to be a presumption that the agency's determination was correct. In *Dacey v. Milk Control Comm'n*,<sup>13</sup> the Massachusetts Supreme Judicial Court did not find the agency's determination that an immediate adoption of the amendment (to a regulation) necessary for the general welfare to be arbitrary, capricious, or an abuse of discretion. However in a later case, *Pioneer Liquor Mart., Inc. v. Alcoholic Beverages Control Commission*,<sup>14</sup> the same court said:

<sup>8</sup> Ind., Me., Md., Mo.

<sup>9</sup> ALAS. §44.62.250; ARIZ. §41-1003; ARK. §5-703; CAL. GOV'T. CODE §11421; CONN. §4-47; D.C. §1-1505; FLA. §120.04; GA. §3A-104; HAWAII §91-3; IDAHO §67-5203; KAN. §77-422; KY. §13.085; LA. §49.953; MASS. ch. 30A §2; MICH. §24.248; MINN. §15.0412 Subd. 5; MONT. §82-4204; NEB. §84-907; NEV. §233B.060; N.J. §52:14B-4; N.M. §4-32-4; OHIO §119.03; OKLA. tit. 75 §303; ORE. §183.335; R.I. §42-35-3; S.D. §1-26-8; VT. tit. 3 §803; VA. §9-6.5; WASH. §34.04.030; W. VA. §29A.3.5; WIS. §227.027; WYO. §9-276.21.

<sup>10</sup> CONN. §4-47; MINN. §15.0412; NEB. §84-907; OHIO §119.03.

<sup>11</sup> I F. COOPER, *STATE ADMINISTRATIVE LAW* 201 (1965). Cooper feels that the lack of criteria may allow agencies or the executive to effectively deny the right to hearing provided for in the regular rule-making procedure by arbitrarily using emergency process.

<sup>12</sup> ALAS. §44.62.250; ARIZ. §41-1003; ARK. §5-703(b); CAL. GOV'T. CODE §11421(b); D.C. §1-1505(c); FLA. §120.04(3); GA. §3A-104(b); HAWAII §91-3; IDAHO §67-5203(b); KAN. §77-422; LA. §49-953; MASS. ch. 30A §2(3); MICH. §24.248; MONT. §82-4204; N.J. §52:14B-4; N.M. §4-32-4(b); OKLA. tit. 75 §303(b); R.I. §42-35-3; S.D. §1-26-8; VT. tit. 3 §803(b); VA. §9-6.5; WASH. §34.04.030; W. VA. §29A.3.5; WIS. §227.027.

<sup>14</sup> 350 Mass. 1, 212 N.E.2d 549 (1965).

<sup>13</sup> 340 Mass. 681, 166 N.E.2d 362, 364 (1960).

We recognize that "emergency" findings . . . must be carefully scrutinized because if unwarrantably made they may lead to improper denial of public hearings or comment on regulations . . . and possibly to other serious abuse.<sup>15</sup>

Even so, the court upheld the "emergency" regulation despite the admittedly meager character of the commission's statement of the "emergency." In order to preclude abuses of emergency discretion, the Revised Model State Administrative Procedure Act (RMSAPA) requires that a statement of findings or reasons for the agency's use of the emergency process accompany the rule when it is filed.<sup>16</sup> The above cited Massachusetts cases show that this is not the complete answer. In Kansas, a state rules and regulations board consisting of the attorney general, the revisor of statutes, and the secretary of state determines in each case if an emergency exists.<sup>17</sup> Another approach is that taken by Alaska and Kentucky, both of which have a statement of policy that "[Emergencies] must be held to a minimum and are rarely found to exist."<sup>18</sup>

Once promulgated, the regulation usually remains in effect for a period limited by the statute. In most states this period varies from 60 to 120 days. There is a danger that an emergency regulation can become permanent if an unlimited number of renewals is allowed.<sup>19</sup> To prevent this denial of the right to notice and hearing, the RMSAPA provides for a 120 day effective period with one 30 day renewal.<sup>20</sup> Alaska takes a different approach by requiring that the agency comply with the notice and hearing provisions of the rule has expired or before the emergency regulation is repealed.<sup>21</sup> To convert an emergency regulation to a standard regulation most states require compliance with the standard requirements of their acts' rule-making process. This is accomplished in two ways: either during the effective period of the emergency regulation notice and hearing are offered on the emergency regulation; or an identical standard regulation is promulgated. The latter method is the predominant one in acts which mention conversion of emergency regulations.<sup>22</sup>

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<sup>15</sup> *Id.* at 7, 212 N.E.2d. at 555.

<sup>16</sup> REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT §3(b) (hereinafter cited as RMSAPA).

<sup>17</sup> KAN. §77-423.

<sup>18</sup> ALAS. §44.62.270; KY. §13.085.

<sup>19</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 202 (1965).

<sup>20</sup> RMSAPA §3(b).

<sup>21</sup> ALAS. §44.62.250.

<sup>22</sup> ALAS. §44.62.250; CAL. GOV'T. CODE §11421(b); FLA. §120.04(3); GA. §3A-104(b); HAWAII §91-3; IDAHO §67-5203(b); LA. §49:953; MASS. ch. 30A §2(3); MICH. §24.248; MINN. §15.0412; MONT. §82-4204; NEV. §233B.060; N.M. §4-32-4(B); OHIO §119.03(F); OKLA. tit. 75 §303(b); ORE. §183.335; R.I. §42-35-3; VT. tit. 3 §803(b); VA. §9-6; W. VA. §29A-3-5; WYO. §9-276.21.

*Legislative Review*

At least 12 states provide for some manner of review of the regulations made by administrative agencies or departments, by the state legislature or a committee composed of some of its members.

In Alaska an agency or departmental regulation may be annulled by a concurrent resolution of both houses. By requiring a resolution instead of a bill, this law eliminates the need for approval by the governor when annulling an administrative regulation. In addition, Alaska requires an annual review of all regulations by the legislative council to see if the legislative intent is followed. The legislative council then sends a comprehensive report, with recommendations, to the legislature at the start of the regular session.<sup>23</sup>

Connecticut's legislative review is provided by a combination of an interim legislative regulation review committee and a biannual review of all current regulations by the general assembly. A copy of each new regulation is given to the committee for study, during which public hearings may be held at the discretion of the committee. If the committee disapproves the regulation, it is void.<sup>24</sup> The assembly's review process consists of sending all effective regulations to the appropriate committee for consideration and hearings. The regulation can be disapproved by resolution and made void. The assembly may also, by resolution, reverse a vote of disapproval by the interim committee.<sup>25</sup>

In Iowa, where there is no provision for notice and hearing in the administrative rule making process, there is, however, a detailed provision for control by the legislature and its committees of this process. A bipartisan legislative committee composed of three state senators and three representatives designated as the departmental rules review committee is established.<sup>26</sup> This committee publishes notice of public meetings which it holds so that any interested party may be heard or present evidence concerning any proposed regulation.<sup>27</sup> The committee may make recommendations to the agency but the agency is free to accept or reject them.<sup>28</sup> However the agency is required to submit the committee's findings and an attorney general's opinion along with the proposed regulation when it is filed.<sup>29</sup> All the rules are then referred to the assembly and are

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<sup>23</sup> ALAS. §44.62.320.

<sup>24</sup> CONN. §4-48.

<sup>25</sup> CONN. §4-49.

<sup>26</sup> IOWA §17A.2.

<sup>27</sup> IOWA §17A.3.

<sup>28</sup> IOWA §17A.7. *See also* 1 F. COOPER, STATE ADMINISTRATIVE LAW 225 (1965).

<sup>29</sup> IOWA §17.8.

studied by the appropriate legislative committee of that body. The committees then make their report and the assembly may proceed by law to overcome any objection of the committees.<sup>30</sup>

Idaho requires that all rules be sent to the House and Senate before the first day of the session following promulgation.<sup>31</sup> The rules are then referred to standing committees in the same manner as bills. If the committee finds that the rule violates the legislative intent of the statute under which the rule was made, a resolution may be adopted amending or modifying it.<sup>32</sup>

In 1972, Kentucky passed a law<sup>33</sup> providing for review of every regulation except emergency regulations by a permanent subcommittee of the legislative research commission known as the administrative regulation review subcommittee. If they find that the regulation does not conform to the statutory authority of the agency or does not coincide with the legislative intent, and the agency refuses to revise or amend it, the regulation is transmitted to the clerks of the state House and Senate for such action as the legislative bodies may deem appropriate.<sup>34</sup>

Michigan provides for several methods of legislative review. A legislator can have copies of all proposed regulations or amendments delivered to him upon his request.<sup>35</sup> This allows him to review a rule and determine if he would like to take any action which is allowed under §24.251. All regulations go through the joint committee on administrative rules. The committee either approves or disapproves the regulation. If the latter, the joint committee will introduce a concurrent resolution to the legislature which must then be adopted within three months from the time the proposed regulation was submitted or the agency can proceed with adoption.<sup>36</sup> If the joint committee or a member of the legislature believes the promulgated rule is unauthorized, or does not conform with the legislative intent, or is inexpedient, he may either introduce a concurrent resolution or introduce a bill to repeal the rule.<sup>37</sup> This allows a wide degree of legislative scrutiny and provides more legislative control than a mere screening through a committee of some type.

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<sup>30</sup> IOWA §17.10.

<sup>31</sup> IDAHO §67-5217.

<sup>32</sup> IDAHO §67-5218.

<sup>33</sup> KY. §13.087 (Supp. 1972).

<sup>34</sup> *Id.*

<sup>35</sup> MICH. §24.241a.

<sup>36</sup> MICH. §24.245.

<sup>37</sup> MICH. §24.251.

The Nebraska statutes provide that a copy of the agency's rules currently in force must be filed prior to the start of the regular legislative session. The legislature then considers the rules and may reject, change, alter, amend, or modify them in any manner it deems advisable.<sup>38</sup> The statute in Oklahoma, like the Nebraska statute, requires an annual review of all current rules by the legislature and also requires all newly promulgated rules to be reviewed within ten days after adoption or ten days after convening the next session. The rule can be disapproved by adoption of a joint resolution and failure to disapprove within thirty days of submission for review results in approval by the legislature.<sup>39</sup> However, in *Oklahoma Alcoholic Beverage Control Bd. v. Welch*,<sup>40</sup> the Oklahoma Supreme Court held that this approval by silence did not give validity to a regulation which the Alcoholic Beverage Control Board was not empowered to adopt.

The Virginia act provides that any rule shall be null and void after either house of the General Assembly adopts a resolution declaring it so and prohibits adoption of any rule having substantially the same object until the General Assembly repeals the resolution.<sup>41</sup> In Washington, all rules are subject to legislative review to determine if they conform with the intent of the authorizing statutes. This is in addition to a provision for a biennial review of agency regulations to see if the legislative intent is being followed.<sup>42</sup>

Two states have repealed their laws providing for legislative review. In Kansas the law was seldom used because there was no provision for routine submissions to the legislature.<sup>43</sup> The Wisconsin statute provided for a joint legislative committee which reviewed administrative rules and regulations but had advisory powers only.<sup>44</sup>

Although several states have repealed their laws providing for legislative review of administrative rules, it seems that legislative review remains a viable means of checking the power of the executive agencies and, in addition, provides close and constant contact between the agencies and the legislative branch.

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<sup>38</sup> NEB. §84.904.

<sup>39</sup> OKLA. tit. 75 §308.

<sup>40</sup> 446 P.2d 287 (Okla. 1968).

<sup>41</sup> VA. §9-6.9(d).

<sup>42</sup> WASH. 34.04.160.

<sup>43</sup> KAN. LAWS 1939 ch. 308, KAN. LAWS 1965 ch. 506 §40. See also 1 F. COOPER, STATE ADMINISTRATIVE LAW 225 (1965).

<sup>44</sup> WIS. §227.041 repealed by L 1965 C. 659 §21 enacted Sept. 1, 1966. See also 1 F. COOPER STATE ADMINISTRATIVE LAW 229 (1965).



*Internal Review by the Agency*

After a rule has been promulgated by the agency and has passed any required review by the legislature, the next question to be asked by those affected will probably be: What does it mean and how will it affect the petitioner? Is there any procedure to modify or repeal or declare invalid a particular rule? These questions may be answered in two ways, either by having the agency respond through a process of internal review or by petitioning a court for a declaratory judgment. Because agency review is in most instances less costly, easier, and sometimes required by the courts before they will consider a petition for declaratory judgment, this process will be considered first.

There are three basic processes by which agencies review existing regulations. They are the informal advisory opinion, the petition for promulgation, amendment, or repeal, and the petition for a declaratory ruling. The informal advisory opinion process is by far the easiest. All that is needed is a call or letter requesting an opinion by the agency. In most cases these opinions are not legally binding on either party and the agency is free to change its position. As Cooper suggests, the convenience of these opinions may in most instances outweigh the disadvantages.<sup>45</sup>

If a person is not satisfied by the results of an informal opinion, he may pursue one of the two formal methods of review. Of the states reviewed, six provided no statutory method for internal review.<sup>46</sup> Of these states at least one, Kansas, has some form of agency internal review not found in its general administrative procedure act because its statute for declaratory judgment requires the plaintiff to first request the agency to pass upon the validity of the regulation in question.<sup>47</sup> The petition for promulgation, amendment, or repeal is found in all states having a formal internal review method.<sup>48</sup> This process is available to any interested person and is initiated by filing the petition. One of the problems encountered in using this method is the agency failing to take action on the petition. As a remedial measure, the drafters of the RMSAPA added a provision requiring the agency to deny the petition in writing or initiate rule making proceedings.<sup>49</sup> This is the approach taken by

<sup>45</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 245-46 (1965).

<sup>46</sup> Ala., Fla., Ind., Kan., Ky., Ohio.

<sup>47</sup> KAN. 77-434.

<sup>48</sup> ALAS. §44.62.220; ARK. §5-703; CAL. GOV'T. CODE §11426; CONN. §4-4; D.C. §1-1505; GA. §3A-109; HAWAII §91-6; IDAHO §67-5206; LA. §49:953; ME. tit. 5 §2354; MD. Art. 41 §248; MASS. ch. 30A §4; MICH. §24.238; MINN. §15.0415; MO. §536.040; MONT. §82-4207; NEB. §84-910; NEV. §233B.100; N.J. §52:14B-8; N.M. §4-32-7; OKLA. tit. 75 §305; ORE. §183.390; R.I. §42-35-6; S.D. §1-26-13; VT. tit. 3 §806; VA. §9-6.8; WASH. §34.04.06; W. VA. §29A-3-6; WIS. §227.015; WYO. §9-276-24.

<sup>49</sup> RMSAPA §6.

Alaska in §44.62.230 of its act. A much more stringent provision is found in the Wisconsin act. To prevent the agency from having to answer frivolous petitions, the right to petition is restricted to any municipality, any corporation, or any five or more persons having an interest in the rule. The petition must state the substance or nature of the rule requested, the reasons for the request, the petitioners' interest in it, and references to the authority of the agency to take the action requested. In return, the agency must, within a reasonable period, either deny in writing the petition or initiate the rule-making procedure. The denial must be accompanied by a statement of justification.<sup>50</sup> It is possible, therefore, by using this type of petition to have the agency review a current regulation by petitioning for an amendment or repeal and if the Wisconsin or RMSAPA approach is used the agency will have to give reasons for its denial and do it within a reasonable time.

In addition to the above petition, a number of state statutes provide declaratory rulings by the agency.<sup>51</sup> Most of these statutes allow any interested person or party to file such petition. New Mexico requires the party filing to have interests, rights, or privileges which are immediately affected.<sup>52</sup> Where the scope of the inquiry is mentioned, such scope includes the applicability of the rule or the statutory provision to any person, property, or state of facts.<sup>53</sup> Under the RMSAPA, the agencies provide their own rules and procedures for filing these petitions, and the declaratory ruling or a refusal to issue same is subject to judicial review just as the decisions in contested cases.<sup>54</sup> This, like the provision in the petition for adoption, requiring an answer within thirty days forces the agencies to take action on petitions submitted to them and allows persons to go to the courts with an agency's final decision.

### *Declaratory Judgments*

In order for a party to obtain a judicial determination of the applicability or validity of an agency regulation, many states provide for a declaratory judgment action in their administrative pro-

<sup>50</sup> WIS. §227.015.

<sup>51</sup> ARK. §5-706; D.C. §1-1508; GA. §3A-112; HAWAII §91-8; IDAHO §67-5208; LA. §49:962; ME. tit. 5 §2402; MD. Art. 41 §250; MASS. ch. 30A §8; MICH. §24.263; MONT. §82-4218; NEB. §84-912; NEV. §233B.120; N.M. §4-32-9; OKLA. tit. 75 §307; ORE. §183.410; R.I. §42-35-8; S.D. §1-26-15; VT. tit. 3 §808; WASH. §34.04.080; W. VA. §29A-4-1.

<sup>52</sup> N.M. §4-32-9.

<sup>53</sup> ARK. §5-706; D.C. §1-1508; GA. §3A-112; HAWAII §91-8; IDAHO §67-5208; LA. §49:962; ME. tit. 5 §2402; MD. Art. 41 §250; MASS. ch. 30A §8; MICH. §24.263; NEB. §84-912; N.J. §52:14B-8; OKLA. tit. 75 §307; ORE. §183.410; S.D. §1-26-15; VT. tit. 3 §808; WASH. §34.04.080; W. VA. §29A-4-1.

<sup>54</sup> RMSAPA §8.

cedure acts.<sup>55</sup> These provisions vary widely from state to state. The requirements for standing, for instance, range from any interested person<sup>56</sup> or any person except the agency making the rule,<sup>57</sup> to those who can show that a review of the rule by the court in conjunction with a review of a final agency decision in a contested hearing would not provide an adequate remedy and would inflict irreparable injury.<sup>58</sup> The most common provision requires that the party filing have his legal rights or privileges impaired or threatened by the rule or its threatened application.<sup>59</sup>

Some states require the party filing for declaratory judgment to first exhaust all administrative remedies or to have the agency first pass on the regulations. However, this requirement may be bypassed if the courts determine that the interests of justice require it.<sup>60</sup> In a New Jersey case, the court held that the rule requiring exhaustion of administrative remedies ". . . is neither jurisdictional nor absolute."<sup>61</sup> In the light of this and other decisions concerning the exhaustion of administrative remedies before appeal to the courts in contested cases,<sup>62</sup> it seems that the requirement is not iron clad and that the courts will not demand that a party engage in an obviously fruitless proceeding with an agency before petitioning the courts for relief.

Cooper mentions five tests used by the courts to determine the validity of rules. They are:

1. A rule is invalid if it exceeds the authority conferred by statute;
2. A rule is invalid if it conflicts with the governing statute;
3. Rules are void if they extend or modify the statute;
4. Rules having no reasonable relationship to statutory purpose are void;

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<sup>55</sup> ALAS. §44.62.300; ARIZ. §41-1007; ARK. §5-705; CAL. GOV'T. CODE §11440; D.C. §1-1508; FLA. §120.3011; GA. §3A-111; HAWAII §91-7; IDAHO §67-5207; KAN. §77-434; LA. 49:963; MD. Art. 41 §249; MICH. §24.264; MINN. §15.0416; MO. §536.050; MONT. §82-4219; NEB. §84-911; NEV. §233B.110; N.J. §§52:14B-8, 52:14B-12; N.M. §4-32-8; OHIO §119.11; OKLA. tit. 75 §306; R.I. §42-35-7; S.D. §1-26-14; VT. tit. 3 §807; VA. §9-6.9; WASH. §34.04.070; W. VA. §29A-4-2; WIS. §227.05.

<sup>56</sup> See ALAS. §44.62.300; CAL. CIV. PRO. CODE §1440; HAWAII §91-7.

<sup>57</sup> W. VA. §29A.4.2.

<sup>58</sup> LA. §49:963.

<sup>59</sup> ARIZ. §41-1007; GA. §3A-111; IDAHO §67-5207; KAN. §77-434; MICH. §24.264; MD. Art. 41 §249; MONT. §82.4219; NEB. §84-911; NEV. §233B.110; MINN. §15.0416; R.I. §42-35-7; S.D. §1-26-14; VT. tit. 3 §807; WASH. §34.04.070.

<sup>60</sup> *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (1971).

<sup>61</sup> *Essex Council No.1 N.J. Civil Serv. Ass'n. Inc., v. Gibson*, 114 N.J. Super. 576, 277 A.2d 562 (1971).

<sup>62</sup> See *Scope Judicial Review*, *infra*, pages 308-14.

5. Courts will set aside rules deemed to be unconstitutional or arbitrary or unreasonable.<sup>63</sup>

These tests have been condensed in several statutes to three:

1. A rule will be declared invalid if it violates the constitutional provisions;
2. A rule is invalid if it exceeds the statutory authority of the agency;
3. A rule is void if it was not adopted in compliance with statutory rule-making procedures or if the agency declared an emergency when in fact none existed.<sup>64</sup>

In other statutes the scope of the judicial review is generally given as looking into the validity or applicability of the rule.<sup>65</sup> These are the methods by which a party may contest a regulation after it has been promulgated, but before it results in a contested case.

### Subpoena Power

The need to provide for compulsory process to obtain evidence has resulted in a fairly wide-spread grant of subpoena power under the various administrative procedure acts.<sup>66</sup> A legislative grant of such power is necessary as an agency, by itself, has no inherent right to issue subpoenas.<sup>67</sup> Where the requisite grant exists, however, it may be as comprehensive as the legislature deems fit to make it.<sup>68</sup> Often, where the legislature in the administrative procedure act has granted the basic subpoena power to the agencies, it also has provided for an enforcement power through the courts.<sup>69</sup>

Generally, the agency's power to issue subpoenas and subpoenas *duces tecum* is limited to contested cases where the agency is functioning in its quasi-judicial role and no such power exists in con-

<sup>63</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 250-62 (1965).

<sup>64</sup> ALAS. §44.62.300; ARK. §5-705; CAL. GOV'T. CODE §11440; HAWAII §91-7; KAN. §77-434; LA. §49:963; MD. Art. 41 §249; NEB. §84-911; VA. §9-6.9; WASH. §34.04.070; WIS. §227.05.

<sup>65</sup> ALAS. §44.62.300; ARIZ. §41-1007; FLA. §120.30(1); LA. §49:963; R.I. §42-35-7; W. VA. §29A-4-2.

<sup>66</sup> ALAS. §44.62.430; ARIZ. §41-1010; ARK. §5-708; CAL. GOV'T. CODE §11510; GA. §3A-114; HAWAII §92-12; IND. §63-3021; LA. §49:956; ME. tit. 5, §2406; MASS. ch. 38, §12; MICH. §24.273; MO. §536.077; MONT. §82-4211; NEB. §84-914; N.D. §28-32-10; OHIO §119.09; OKLA. tit. 75, §315(2); ORE. §183.440; PA. tit. 71, §200; S.D. §1-26-19.1; WASH. §34.04.090; WYO. §9-276.25.

<sup>67</sup> *Commission ex rel. Margiotti v. Orsini*, 363 Pa.259, 81 A.2d 891 (1951).

<sup>68</sup> *Pope & Talbot, Inc. v. Smith*, 216 Ore. 605, 340 P.2d 960 (1959).

<sup>69</sup> ARIZ. §41-1010; ARK. §5-709; GA. §3A-114; HAWAII §92-12; IND. §63-3021; LA. §49:956; ME. tit. 5, §2406; MASS. ch. 38, §12; MICH. §24.273; MO. §536.077; MONT. §82-4211; N.D. §28-32-10; OHIO §119.09; OKLA. tit. 75, §315; ORE. §183.440; S.D. §1-26-19.1; WASH. §34.04.105; WYO. §9-276.25.

nection with its rule making process.<sup>70</sup> When exercised within its statutory bounds, the power to subpoena witnesses and to force production of evidence belongs to any party to the proceedings provided the subpoena itself is issued in the name of the agency.<sup>71</sup> An agency's refusal to issue a requested subpoena has been held to be immediately subject to judicial review.<sup>72</sup>

It should be noted that a few of the acts which define the scope of the agency's subpoena power do not *grant* that power but simply specify that the acts' provisions apply only to those agencies granted the subpoena power by law or by special statute.<sup>73</sup>

### Discovery

The right of administrative agencies to utilize discovery procedures is generally confined, by statute, to contested cases or adjudicatory hearings before the agency.<sup>74</sup> Although the use of the subpoena is the primary information gathering device available to the agency where authorized by statute, the power to authorize the taking of depositions also is granted by the legislature in many of the acts.<sup>75</sup>

This power, as commonly expressed, permits the agency to take depositions as in civil cases<sup>76</sup> or, more simply, to order and obtain any deposition the agency deems necessary.<sup>77</sup> At least one court has found that the legislative purpose behind granting the right to take depositions is not for the usual discovery purposes but exists to enable the agency to secure evidence for use at the hearing.<sup>78</sup> This view seems somewhat justified in the Arizona discovery provision which permits depositions only of witnesses who are either unable to attend the hearing or who cannot be subpoenaed.<sup>79</sup>

<sup>70</sup> *But see* WASH. §34.04.105 (1) (power to subpoena witness and evidence for rulemaking hearing).

<sup>71</sup> ALAS. §44.62.430; ARK. §5-709(c); CAL. GOV'T. CODE §11510; IND. §63-3021; LA. §49:956; ME. tit. 5, §2406; MASS. ch. 38, §12; MICH. §24.273; MO. §536.077; MONT. §82-4211; N.D. §28-32-09; OHIO §119.09; OKLA. tit. 75, §315; ORE. §183.440; WASH. §§34.04.090, 34.04.105; WYO. §9-276.25.

<sup>72</sup> *Shively v. Stewart*, 65 Cal.2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966).

<sup>73</sup> *See, e.g.*, FLA. §120.25; W. VA. §29A-5-1.

<sup>74</sup> ALAS. §44.62.440; ARIZ. §41-100; CAL. GOV'T. CODE §11511; FLA. §120.25; GA. §3A-114; IND. §63-3007; LA. §49:956; MO. §536.073; MONT. §82-4211; NEB. §84-914; N.M. §4-32-10A5; N.D. §28-32-09; OHIO §119.09; OKLA. tit. 75, §315; ORE. §183.425; S.D. §1-26-19.2; WASH. §34.04.090; W. VA. §29A-5-1c; WYO. §9-276.25.

<sup>75</sup> *Id.*

<sup>76</sup> ALAS. §44.62.440; CAL. GOV'T. CODE §11511; LA. §49:956; MO. §536.073; NEB. §84-914; N.D. §28-32-09; OHIO §119.09; ORE. §183.425; S.D. §1-26-19.2; WYO. §9-276.25.

<sup>77</sup> FLA. §120.25; GA. §3A-114; IND. §63-3007; MONT. §82-4211; OKLA. tit. 75, §315; WASH. §34.04.090; W. VA. §29A-5-1c.

<sup>78</sup> *Shively v. Stewart*, 65 Cal.2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966).

<sup>79</sup> ARIZ. §41-1010.

At present, two of the states, Michigan and Louisiana, permit agencies bound by their administrative procedure acts to adopt the necessary discovery procedures for themselves.<sup>60</sup> New Mexico and Wyoming seem to have solved the problems that the granting of such unlimited agency discretion would produce by providing for the availability of all discovery procedures otherwise available in court on demand by any party.<sup>61</sup> It should be noted that only a few of the statutes specifically provide for an agency right to compel compliance with its discovery procedures by court order.<sup>62</sup>

### Hearing Procedures for Contested Cases

#### *Composition of Adjudicatory Body — Who Is to Hear the Case*

The question of who is to hear the contested case is one which has not been met by the vast majority of state statutes. In most cases the omission has been deliberate, primarily because of the various approaches to the problem taken by each agency within the state.<sup>63</sup> Some states provide that all agency members shall hear a case or, in the alternative, that their hearing duties may be delegated to a hearing officer or to certain members of the agency.<sup>64</sup> Three states, however, specifically provide for the appointment of a qualified hearing officer.<sup>65</sup> Of these, the California approach is the most thorough. The hearing is conducted by a hearing officer who is one of a group of such officers on the staff of the state's Office of Administrative Procedure. In order to qualify as such, the hearing officer must have been admitted to the practice of law in California for at least five years and possess any additional qualifications required by the State Personnel Board.<sup>66</sup> The agency decides whether the hearing officer is to hear the case alone or in conjunction with the agency members. In the former situation, after the case is heard, the hearing officer prepares a decision which the agency may adopt or modify after affording the parties opportunity to be heard. In the latter situation, the hearing officer presides at the hearing, regulates its course, and assists the agency members.<sup>67</sup>

The Alaska statute is similar to California's, requiring the Governor to appoint qualified, impartial hearing officers with sufficient experience in the general practice of law to conduct hearings.<sup>68</sup>

<sup>60</sup> LA. §49:956; MICH. §24.274.

<sup>61</sup> N.M. §4-32-10A; WYO. §9-276.25.

<sup>62</sup> CAL. GOV'T. CODE §11507.6; MONT. §82-4211; WYO. §9-276.25.

<sup>63</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 331 (1965).

<sup>64</sup> E.g., ARK. §5-709(b); IND. §63-3007; MICH. §24.279; WYO. §9-276.30(a).

<sup>65</sup> ALAS. §44.62.350; CAL. GOV'T. CODE §11502; OHIO §119.09.

<sup>66</sup> CAL. GOV'T. CODE §11902.

<sup>67</sup> CAL. GOV'T. CODE §11512.

<sup>68</sup> ALAS. §44.62.350.

Ohio allows the agency itself to appoint a referee or examiner. Such individual must have been admitted to the practice of law in the state and possess any additional qualifications the agency requires.<sup>89</sup>

### *Right to Counsel*

In an appearance in a contested case before the above-mentioned hearer or hearers, a party to such case will most likely wish to be represented by counsel. Although the majority of states do not expressly grant this right in their administrative procedure acts, most courts nevertheless allow the party to have legal counsel. Cooper believes that this is a result of widespread recognition by state courts of an individual's right to counsel in any proceeding affecting his rights,<sup>90</sup> as established by *Powell v. Alabama*.<sup>91</sup> The *Powell* doctrine was specifically applied to an administrative proceeding in *Goldberg v. Kelly*,<sup>92</sup> in which the court held, *inter alia*, that a welfare recipient had the right to be represented by counsel at a hearing to determine whether his benefits would continue.

Foregoing reliance on state agencies to enforce the above decision absent an express statutory provision, several states have enacted statutes unqualifiedly granting the right to be represented by counsel to a party appearing in a contested case before a state agency.<sup>93</sup> Other states grant the right by implication, generally in a provision that notice of a final decision or order in a contested case is to be served on a party or his attorney of record.<sup>94</sup>

No state imposes upon itself or its agencies the duty of providing counsel for an indigent party to an administrative proceeding, and Montana specifically disclaims any such obligation.<sup>95</sup> However, Mr. Justice Black, in his dissent in *Goldberg*, indicates that if there is a right to counsel in an administrative proceeding, logically the policy of *Gideon v. Wainwright*<sup>96</sup> should apply, requiring the state to furnish counsel free of charge to an indigent party.<sup>97</sup> To the authors' knowledge this issue has not yet been raised.

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<sup>89</sup> OHIO §119.09.

<sup>90</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 328-29 (1965).

<sup>91</sup> 287 U.S. 45 (1932).

<sup>92</sup> 397 U.S. 254, 270 (1970).

<sup>93</sup> ARIZ. §41-1010; ARK. §5-709(a); CAL. GOV'T. CODE §11505(b); D.C. §1-1509(b); FLA. §120.26(6); MONT. §82-4221; N.M. §4-32-11F; OHIO §119.03; OKLA. §310(5).

<sup>94</sup> IDAHO §67.5215; ORE. §183.470; R.I. §45-35-12; VT. tit. 3, §812; WASH. §34.04.120; W. VA. §29A-5-3; WIS. §227.14; WYO. §9-276.28.

<sup>95</sup> MONT. §82-4221.

<sup>96</sup> 372 U.S. 335 (1963). This concept is furthered by the Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), expanding the indigent's right to counsel to specified misdemeanors as well as felonies.

<sup>97</sup> *Goldberg v. Kelly*, 397 U.S. 254, 279 (1970).

*Right to Public Hearing*

Only a few states specifically grant the right to an open or public hearing,<sup>98</sup> and the Alaska statute states that a public hearing is not required.<sup>99</sup> According to Cooper, generally, administrative hearings are open to the public, although he suggests that an agency's discretion to open or close a hearing should be congruent to that of a trial court.<sup>100</sup>

*Procedure During Hearing*

In most states the hearing itself is conducted in accordance with the agency's own rules, each state's administrative procedure act requiring each agency to ". . . adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available . . . ."<sup>101</sup>

A few states prescribe the manner in which such rules are to be administered. Usually the agency, an agency member, or the hearing examiner is empowered to rule on offers of proof, regulate the course of the hearing, and dispose of procedural requests and similar matters.<sup>102</sup>

The California and Alaska statutes on hearing procedure provide, alternatively, for two types of hearings. In the first type, the hearing officer hears the case alone and exercises all regulatory powers over the course of the proceedings. In the second type, the officer hears the case together with the agency, ruling on the admissibility of evidence and advising the agency on matters of law, while the agency members exercise all other regulatory powers (*e.g.*, regulating the course of the hearing, ruling on offers of proof, etc.). However, if the agency so desires, it may delegate all, or any part of such powers to the hearing officer.<sup>103</sup>

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<sup>98</sup> ARIZ. §41-1010; FLA. §120.22 (but public hearing not required; waived by party or as otherwise provided by law); IND. §63-3008; WIS. §227.07.

<sup>99</sup> ALAS. §44.62.310(d)(1).

<sup>100</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 353 (1965).

<sup>101</sup> ARK. §5-702(c)(2); FLA. §120.23; IDAHO §67-5202; LA. §49:953(2); MINN. §15.0412; NEB. §84-909; NEV. §233B.050; OKLA. tit. 75, §302; ORE. §183.330; R.I. §42-352; S. D. §1-26-2(2); VT. tit. 3, §802(c)(2); WASH. §34.04.090; W. VA. §29A-5-1(b); WIS. §227.08; WYO. §9-276.20.

<sup>102</sup> ARK. §5-709(c) (authority granted to presiding officer only); FLA. §120.25; W. VA. §29A-5-1(d).

<sup>103</sup> ALAS. §44.62.450; CAL. GOV'T CODE §11512; *Ehrlich v. McConnell*, 166 Cal. App.2d 129, 333 P.2d 171 (1969) (order of procedure during hearing is subject to discretion of hearing officer); *Feist v. Rowe*, 3 Cal. App.3d 404, 83 Cal. Rptr. 465 (1970) (order of proof is within discretion of hearing officer).



A few acts simply state that the agency, the presiding officer, or the hearing officer shall regulate the course of the hearing, without granting authority to adopt specific rules of procedure.<sup>104</sup>

The New Mexico statute is unique in its treatment of the hearing procedure. It provides that rules of practice and procedure which are applicable to civil actions in the state district courts may be utilized by the parties at any stage during the proceedings. If the agency declines to enforce any such rule, it will be enforced by the district court with jurisdiction upon application to that court for an order requesting such procedure.<sup>105</sup> The purpose of this provision would seem to be to allow for informal proceedings if the parties should so desire, while preserving the right to have the more stringent rules of a civil court applied.

### *Burden of Proof*

Only two jurisdictions specifically provide for allocating the burden of proof in an administrative proceeding.<sup>106</sup> Both of these place the burden on the proponent of the rule or order. Cooper attributes the absence of a statutory provision in this area to the universal use, by the state courts, of the common law rule which requires the moving party to sustain the burden of proof, including not only the burden of going forward with the evidence, but also the burden of ultimate persuasion.<sup>107</sup> Thus, where the proceeding is disciplinary in nature, the burden of proof is on the agency;<sup>108</sup> whereas when a party seeks to obtain a license, take an examination, or claim a right, the burden of proof is on him to establish his right to do so.<sup>109</sup> However, application of the above principles does not always yield the expected result as is illustrated by comparing similar cases from different jurisdictions. In *Reinke v. Personnel Bd.*,<sup>110</sup> the appellant, a youth counselor at a state school for girls, was dismissed from her position by the board. The Wisconsin Supreme Court held that in a discharge proceeding the appointing authority had the burden of proving that the discharge was for cause, and that the Personnel Board had erred in placing the burden on the appellant. In *Smith v. School Dist. of Darby*,<sup>111</sup>

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<sup>104</sup> IND. §63-3007 (agency regulates hearing); MICH. §24.280 (presiding officer regulates); MONT. §82-4211 (agency members or hearing officer regulates).

<sup>105</sup> N.M. §4-32-11 I.

<sup>106</sup> ARK. §5.709(d); D.C. §1-1509(b).

<sup>107</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 355 (1965).

<sup>108</sup> *Cornell v. Reilly*, 127 Cal. App.2d 178, 273 P.2d 572 (1954); *Reinke v. Personnel Bd.*, 33 Wis.2d 123, 191 N.W.2d 33 (1971).

<sup>109</sup> *Lay v. State Bd. of Osteopathic Examiners*, 179 Cal. App.2d 356, 3 Cal. Rptr. 727 (1960).

<sup>110</sup> 33 Wis.2d 123, 191 N.W.2d 33 (1971).

<sup>111</sup> 388 Pa. 301, 130 A.2d 661 (1957).

however, appellant was demoted from his position of supervising school principal. The Pennsylvania Supreme Court held that the burden was on the appellant to prove that the action of the school board was arbitrary and therefore improper. Thus it can be seen that fine distinctions are drawn in allocating the burden of proof, perhaps indicating a need for more states to enact a statutory provision in this area.

### *Rules of Evidence*

Most states have adopted provisions the same, or substantially the same as those of the RMSAPA regarding rules of evidence.<sup>112</sup> They are:

In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non-jury] civil cases in the [district courts of this state] shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied on by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.<sup>113</sup>

It is obvious that these evidentiary rules are less stringent than those employed in the courts, because of the clause permitting the introduction of evidence not ordinarily admissible if it is of a type commonly relied on by reasonably prudent men. Cooper indicates that the model statute is a compromise between two opposite views.<sup>114</sup> One view holds that the rules should be even more lenient, allowing the introduction of *any* evidence a reasonable man would rely on; the other holds that, in the interest of simplification and uniformity, agencies should follow the same rules as courts do in civil cases. The former position originated during an earlier period when administrative agencies were composed of people without a great deal of expertise in the law who conducted hearings in

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<sup>112</sup> ARK. §5-709(d); IDAHO §67-5210(1); LA. §49:956; ME. §2405; MICH. §24.275; MINN. §15.0419 subd. 1; NEV. §233B.123; N.M. §4-32-11A; OKLA. §310(1); R.I. §42-35-10(c); S.D. §1-26-19(1); VT. tit. 3, §801(1); WASH. §34.04.100(1); W. VA. §29A-5-2; WYO. §9-276.26(a).

<sup>113</sup> RMSAPA (1970).

<sup>114</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW 384 (1965).

which the parties were rarely represented by counsel.<sup>115</sup> It was therefore deemed unnecessary to hold the agencies to technical rules of evidence. However, as administrative practice exists today, with many states providing for legally trained hearing examiners, and all of them granting a party the right to counsel, there seems to be little justification for not applying the same rules of evidence as are used in the trial of civil cases.

One state does provide that, although the normal standard for admissibility is evidence of a type commonly accepted by reasonable prudent men in the conduct of their affairs, a party may request that the agency be bound by the rules of evidence applicable in the state district courts. The request must be made in writing to the agency.<sup>116</sup>

Two states specifically permit the admission of hearsay evidence to explain or supplant other evidence, but admonish that it is insufficient in itself to support a finding unless it would be admissible in a civil proceeding.<sup>117</sup> Two other states simply provide that agencies are not required to follow technical rules of evidence, and that substantial, reliable, and probative evidence should be admitted.<sup>118</sup> Another two states mandate that an offer of proof to which an objection has been sustained will be placed in the record.<sup>119</sup> Montana is the only state which requires that the common law and statutory rules of evidence be followed without exception.<sup>120</sup> Statutes of other jurisdictions are not readily susceptible of categorization.<sup>121</sup>

### *Cross-Examination*

The right of cross-examination is fundamental to a fair hearing. Heeding this maxim, the majority of states afford this important right to parties to a contested case. The right is qualified in many statutes, however, which grant only the "... right to conduct such cross-examination as may be required for a full and true

<sup>115</sup> *Id.* 379, 380.

<sup>116</sup> NEB. §84-914.

<sup>117</sup> ALAS. §44.62.470; CAL. GOV'T. CODE §11513(c).

<sup>118</sup> ARIZ. §41-1010; IND. §63-3008.

<sup>119</sup> MO. §536.070; OHIO §119.09.

<sup>120</sup> MONT. §82-4210.

<sup>121</sup> D.C. §1-1509(b) (any oral or documentary evidence acceptable; irrelevant, immaterial and unduly repetitious evidence to be excluded); MASS. §11(z) (need not observe rules of evidence; standard for admissibility is evidence on which reasonable men rely in the conduct of their affairs); ORE. §183.450 (same rules as applied in equity cases; erroneous admission of evidence does not preclude action on the record unless prejudice is shown); WIS. §227.10(1) (admit all testimony having reasonably probative value); FLA. §120.26 (probative effect given to evidence admissible in civil proceedings but exclusionary rules of evidence are not to be used to prevent receipt of evidence having substantial probative effect).

*disclosure of the facts*"<sup>122</sup> (emphasis added). The reason for the qualification is to provide for the situation in which cross-examination is impractical (e.g., where the evidence is a written report authored by several agency employees), and rebuttal facts are readily obtainable from other sources.<sup>123</sup> Other states do not qualify the right in this manner, and additionally provide that a party has the right to submit rebuttal evidence.<sup>124</sup> Others merely say that each party has the right of cross-examination.<sup>125</sup>

### Establishment of Record

It is desirable that there be a complete record of the hearing in order that the decision of the administrative agency be a completely informed one and to provide a basis for judicial review. To accomplish this, the RMSAPA and those states<sup>126</sup> which have based their administrative procedure acts thereon require the inclusion of the following specific items in the record.

The pleadings, motions, and intermediate rulings must be included in the record. This facilitates crystallization of the issues and compels a decision to be rendered on each point of contention.

All evidence received, *or considered*, must be included to insure that the agency's decision is based solely on the evidence presented and to allow the reviewing court to consider any evidentiary material which the agency might have rejected, thus protecting a party from an adverse decision which is unsupported by evidence in the record, and affording him the opportunity to have a court examine all offers of proof, whether they have been accepted or rejected by the agency.

Official notice in an administrative hearing is the analog of judicial notice in a judicial proceeding. A statement of matters officially noticed is to be made in the record. This informs the parties and the reviewing court as to what assumptions, if any, the agency has relied on in reaching its decision and allows them to rebut any which may be unfounded.

<sup>122</sup> ALAS. §5-709(c); COLO. §3-16-4; D.C. §1-1509(b); FLA. §120-26(z); IDAHO §67-5210(3); LA. §49:955; OKLA. §310(3); R.I. §42.35-10(c); S.D. §1-26-10(z); VT. tit 3, §810(3); WASH. §31.04.100(3); WYO. §9-276.26.

<sup>123</sup> 1 F. COOPER, STATE ADMINISTRATIVE LAW, 373 *et seq.* (1965).

<sup>124</sup> MASS. §11(3); MICH. §24.272(4); MINN. §15.0419 subd. 3; NEB. §84-914(4); N.M. §4-32-11(c); ORE. §183.450(3); W. VA. §29A-5-2(c).

<sup>125</sup> ARIZ. §41-1010; IND. §63-3008; MO. §536.070.

<sup>126</sup> ARIZ. §41-1009; ARK. §5-708(e); IDAHO §67-5209(e); MICH. §24.286; MONT. §82-4709; NEV. §233B.121(5)(b); N.M. §4-32-10D; OKLA. §309(e); ORE. §183.415; R.I. §42-35-91(e); S.D. §1-26-22; VT. tit. 3, §809(e); WASH. §34.04.090(4); WYO. §9-276.25(m), (n).

Offers of proof, objections, and rulings thereon are included in the record to insure its completeness and to disclose to the reviewing court specific evidentiary points upon which the parties and the agency differ.

Proposed findings and exceptions thereto, as well as the report of the hearing officer are also encompassed in the record. Their purpose is to indicate to the parties the reasoning of the agency in arriving at its decision and the basis for such decision. Access to this information will also reveal to a party differences, should there be any, in the rationale relied upon by the hearing officer compared to that used by the agency.

Finally, staff memoranda are to be included so that no pertinent information, upon which the agency may have predicated its findings, can be withheld from a party; both he and the reviewing court will have access to all facts and opinions from which the final order could have been drawn.<sup>127</sup>

### Enforcement of Agency Decision

Once the administrative agency has reached a decision by way of an administrative adjudication, the power of the agency to enforce its decision becomes critically important to both the agency and any party potentially affected by such decision.

Interestingly, of those jurisdictions with administrative procedure acts, only five have a provision for enforcement of an administrative agency's decision.<sup>128</sup> Further, although there are numerically five different enforcement provisions, in substance there are basically only two varieties.

Three states<sup>129</sup> provide that if a person refuses to obey or disobeys any lawful order of an administrative agency, such agency can petition a court of law<sup>130</sup> for a court order directing such person to appear before the court to show cause why he should not be punished for contempt. Substantially in accordance with the foregoing provision is the Arkansas provision<sup>131</sup> which states that an agency can apply to the court<sup>132</sup> for a hearing wherein a court order may be granted, in the court's discretion, directing compliance with the agency's decision; failure to comply with such court order is punishable as contempt.

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<sup>127</sup> For a more detailed discussion of the reasons for the above requirements, see 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 421-43 (1965).

<sup>128</sup> ALAS. §44.62.590; ARK. §5-709; CAL. GOV'T. CODE §11525; IND. §63-3027; MO. §536.095.

<sup>129</sup> ALAS. §44.62.590; CAL. GOV'T. CODE §11525; MO. §536.095.

<sup>130</sup> Alaska, superior court; California, superior court; Missouri, circuit court.

<sup>131</sup> ARK. §5-709.

<sup>132</sup> ARK. §5-709, circuit court.

The remaining state which has an agency enforcement provision in its administrative procedure act, Indiana,<sup>133</sup> provides that an agency can bring an action in equity to compel compliance with the agency's decision.

Noteworthy is the fact that although there may be no express provision in an administrative procedure act authorizing an agency to enforce its own adjudicatory decision, the administrative agency is not necessarily rendered powerless since other statutes ordinarily authorize judicial enforcement of an agency's adjudicatory decision.<sup>134</sup> Further, contempt proceedings may lie to punish one who does not comply with such judicial order or decree of enforcement.<sup>135</sup>

### Stay Pending Appeal

State administrative procedure legislation, involving the power of courts to stay administrative agency action pending review in the courts, is considerably diverse. A number of the state statutes provide for a stay of administrative agency action at the discretion of either the reviewing court or the administrative agency.<sup>136</sup> In effect, such statutory provisions substantially adopt the language of the RMSAPA which states: "The agency may grant, or the reviewing court may order, a stay upon appropriate terms."<sup>137</sup>

While Alaska is included among those states providing for a stay at the discretion of either the administrative agency or the reviewing court,<sup>138</sup> such discretion may be exercised only under certain circumstances. Specifically, as set out in the case of *Alaska Coastal Airlines v. S & M Flight Training*,<sup>139</sup> a stay may be granted only under the following conditions: (a) when petitioner is likely to prevail on the merits of the appeal; (b) where the petitioner has shown that without a stay he will suffer irreparable injury; (c) where there is no substantial harm to other interested persons; and, (d) where the public interest will not be harmed.

While most of the statutory provisions authorize a stay at the discretion of either the administrative agency or the reviewing

<sup>133</sup> IND. §63-3027.

<sup>134</sup> 2 AM. JUR. 2d *Administrative Law* §509 (1962).

<sup>135</sup> 2 AM. JUR. 2d *Administrative Law* §517 (1962).

<sup>136</sup> ALAS. §§44.62.520, 44.62.570; ARK. §5-713; CAL. CIV. PRO. CODE §1094.5; CAL. GOV'T. CODE §11519; COLO. §3-16-5; D.C. §1-1510; FLA. §120.31; GA. §3A-120; HAWAII CODE §91-14; LA. §49:964; MASS. ch. 30A §14; MINN. §15.0424; MO. §536.120; MONT. §82-4216; NEB. §84-917; NEV. §233B.140; N.M. §4-32-18; OKLA. tit. 75, §319; ORE. §183.480; R.I. §42-35-15; VT. tit. 3, §815; WASH. §34.04.130; W. VA. §29A-5-4.

<sup>137</sup> RMSAPA §15(c) (1961).

<sup>138</sup> ALAS. §§44.62.520, 44.62.560.

<sup>139</sup> 6 ALAS.L.J. No. 4, 103 (April, 1968) (unreported superior court decision).

court, generally the same administrative procedure acts additionally provide that a petition or appeal for judicial review does not automatically operate to stay administrative agency action.<sup>140</sup>

Diametrically opposed to those state statutes which provide that a petition or appeal for judicial review does not automatically stay administrative agency action are the administrative procedure acts of South Dakota and Virginia which provide for an automatic stay following the agency's adjudicatory decision.<sup>141</sup>

In a manner similar to the administrative procedure legislation of South Dakota and Virginia, three states provide that in specific cases or under certain circumstances a stay shall automatically issue.<sup>142</sup> While the administrative procedure legislation of Colorado, Florida, and Oklahoma basically provides that a stay is discretionary in either the administrative agency or the reviewing court,<sup>143</sup> such state administrative procedure statutes also specifically provide that a stay shall automatically issue if (a) irreparable injury would otherwise result;<sup>144</sup> (b) the administrative agency order has the effect of suspending or revoking a license;<sup>145</sup> or, (c) enforcement of the administrative agency order would result in irreparable impairment of constitutional rights.<sup>146</sup>

Several state administrative procedure acts authorize the issuance of stays only at the discretion of the reviewing court.<sup>147</sup> While in this situation the agency has no express power to stay its own decision, presumably, such power would be implied.<sup>148</sup>

<sup>140</sup> ALAS. §§44.62.520, 44.62.570; ARK. §5-173; CAL. CIV. PRO. CODE §1094.5; CAL. GOV'T. CODE §11519; COLO. §3-16-5; D.C. §1-1510; FLA. §120.31; GA. §3A-120; HAWAII §91-14; LA. §49:964; MASS. Ch. 30A §14; MINN. §15.0424; MO. §536.120; MONT. §82-4216; NEB. §84-917; NEV. §233B.140; N.M. §4-32-18; OKLA. tit. 75, §319; ORE. §183.480; R.I. §42-35-15; VT. tit. 3, §815; WASH. §34.04.130; W. VA. §29A-5-4.

<sup>141</sup> S.D. §21-33-10, where upon appeal a stay is automatically granted for a 10-day period with any further extension of the stay within the discretion of the court; VA. §9-6.13, where upon appeal a stay is automatically granted unless it appears to the court that immediate enforcement of the order is essential to the public health or safety.

<sup>142</sup> COLO. §3-16-5; FLA. §120.31; OKLA. tit. 75, §319.

<sup>143</sup> ALAS. §§44.62.520, 44.62.570; ARK. §5-173; CAL. CIV. PRO. CODE §1094.5; CAL. GOV'T. CODE §11519; COLO. §3-16-5; D.C. §1-1510; FLA. §120.31; GA. §3A-120; HAWAII §91-14; LA. §49:964; MASS. ch. 30A §14; MINN. §15.0424; MO. §536.120; MONT. §82-4216; NEB. §84-917; NEV. §233B.140; N.M. §4-32-18; OKLA. tit. 75, §319; ORE. §183.480; R.I. §42-35.15; VT. tit. 3, §815; WASH. §34.04.130; W. VA. §29A-5-4.

<sup>144</sup> COLO. §3-16-5.

<sup>145</sup> FLA. §120.31.

<sup>146</sup> OKLA. tit. 75, §319.

<sup>147</sup> ARIZ. §12-931; ILL. ch. 110, §275; IND. §63-3017; ME. tit. 5, §2451; ND. §28-32-20; OHIO §119.12; PA. tit. 71, §1710.43; VA. §9-6.13; WIS. §227.17. Note also that a stay will not be issued in Ohio unless it appears to the court that an unusual hardship would otherwise result.

<sup>148</sup> 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 627 (1965).

Included in the category of state administrative procedure acts which expressly provide for the issuance of a stay is the Indiana act.<sup>149</sup> Noteworthy though, is the fact that the Indiana statute authorizes the reviewing court to use its discretion only if such court finds that the petition for stay shows a reasonable probability that the administrative agency order or determination appealed from is invalid or illegal.<sup>150</sup>

Finally, of the 41 state administrative procedure acts considered, a significant number of such acts contain no provision whatsoever for a stay of the administrative agency action pending review in the courts;<sup>151</sup> consequently, there can be no stay of administrative agency action pursuant to the administrative procedure acts of such states.

### Standing to Obtain Judicial Review

Although most of the administrative procedure statutes provide for some form of judicial relief from administrative action, one of the limitations on the availability of such relief is the requirement of legal standing.<sup>152</sup> Involved in the concept of standing to sue, a widely recognized but often troublesome doctrine,<sup>153</sup> are the issues of justiciability,<sup>154</sup> legal injury or interest,<sup>155</sup> finality of the administrative decision,<sup>156</sup> and exhaustion of extra-judicial remedies.<sup>157</sup> The question of justiciability is dealt with in the administrative procedure acts on the basis of the legal wrong suffered.<sup>158</sup> Generally, the person seeking review of a *rule making* decision must allege that his legal rights or privileges have been impaired or threatened.<sup>159</sup> In seeking judicial review of an *adjudi-*

<sup>149</sup> IND. §63-3017.

<sup>150</sup> *Id.*

<sup>151</sup> Nine of the jurisdictions considered have administrative procedure statutes with no express provision for a stay pending court review: Conn., Idaho, Iowa, Kan., Ky., Md., Mich., N. J., Wyo.

<sup>152</sup> *Rouveyral v. Donnelly*, 365 Mo. 686, 285 S.W.2d 699 (1956); *Baltimore Retail Liquor Package Stores Assoc. v. Kerngood*, 171 Md. 426, 189 A 209 (1937).

<sup>153</sup> *See, e.g., Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>154</sup> *Basiliko v. Government of the District of Columbia*, 283 A.2d 816 (D.C. 1971); *School Comm'n. v. Superintendent of Schools*, 320 Mass. 516, 70 N.E.2d 298 (1946); *Sherwin v. Mackie*, 364 Mich. 188, 111 N.W.2d 56 (1961).

<sup>155</sup> *McCarrell v. Lane*, 76 Ariz. 67, 258 P.2d 988 (1953); *Junior College Dist. of Secalia v. Barker*, 418 S.W.2d 62 (Mo. 1967).

<sup>156</sup> *Arizona Comm'n. of Agric. & Hortic. v. Jones*, 91 Ariz. 183, 370 P.2d 665 (1962); *Powell v. Board of Rule Instr. of Levy County*, 229 So.2d 308 (Fla. 1969).

<sup>157</sup> *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 183 S.E.2d 692 (W.Va. 1971).

<sup>158</sup> *Portwood v. Falls City Brew. Co.*, 318 S.W.2d 535 (Ky. 1958).

<sup>159</sup> D.C. §1-1510; GA. §3A-111; IDAHO §67-5207; MD. Art. 41, §245; MINN. §15.0416; MONT. §82-4219; NEB. §84-911; NEV. §233B.110; OKLA. tit. 75, §306; R.I. §42-35-7; S.D. §1-26-14; VT. tit. 3, §807; WASH. §34.04.070; W. VA. §29A-4-2; WIS. §227.05.



cated or contested case, however, one need only show that he is "aggrieved"<sup>160</sup> or "adversely affected."<sup>161</sup>

The distinctions drawn between appeals from rule making orders and appeals from adjudicated decisions rest on the separation of functions within the administrative agency itself. The procedures dictated by most of the statutes<sup>162</sup> recognize the quasi-legislative nature of rule making as opposed to the quasi-judicial function of applying those rules to individual contestants.<sup>163</sup> Thus, it has been held that the statutory procedure providing for declaratory judgment as to the validity of an administrative rule is not the proper vehicle to obtain judicial review of a contested case where the administrative decision affects only the parties to the proceeding.<sup>164</sup>

The exclusiveness of the statutory review provisions permitting recourse to the courts has been variously construed. Courts have demonstrated reluctance to interfere with the administrative process by inferring an exclusive and primary jurisdiction in the administrative agency by virtue of legislative grant,<sup>165</sup> by finding that judicial review provisions are a matter of legislative grace rather than right,<sup>166</sup> and by refusing original jurisdiction even where the question of damages is involved.<sup>167</sup> Where the act does not provide otherwise, at least one court has found the statutory scheme to be the exclusive method of obtaining judicial review.<sup>168</sup> Others have held the applicable provisions to be permissive only<sup>169</sup> and, if not irreconcilable with other statutes providing for recourse to the judiciary, merely an alternative method of review.<sup>170</sup>

<sup>160</sup> D.C. §1-1510; GA. §3A-120(a); HAWAII §91-14(a); IDAHO §67-5215(a); IND. §63-3014; LA. §49:964; ME. tit. 5, §2451; MASS. ch. 30A, §14; MICH. §24.301; MINN. §15.0424; MO. §536.100; MONT. §82-4216; NEB. §4.917(1); OHIO §119.12; OKLA. tit. 75, §318(1); ORE. §183.480(1); PA. tit. 71, §1710.41; R.I. §42-35-15(a); S.D. §1-26-30; VT. tit. 3, §15; WASH. §34.04.130(1); WIS. §227.16; WYO. §9-276.32.

<sup>161</sup> D.C. §1-1510; N.M. §4-32-16c; OKLA. tit. 75, §318(1); ORE. §183.480(1); W. VA. §29A-5-4(a).

<sup>162</sup> But see, IOWA §17A.11; KAN. §77-434; WYO. §9-276.32 (requirements identical for both rule making and adjudicatory proceedings).

<sup>163</sup> Board of Liquor License Comm'rs. v. Leone, 249 Md. 263, 239 A.2d 82 (1968); Fortner v. Thomas, 22 Ohio St.2d 13, 257 N.E.2d 371 (1970) (procedure under OHIO §119.11 permitting appeals from rules in their final form cannot be utilized to obtain review of quasi-legislative proceedings).

<sup>164</sup> Meikle John v. American Distrib. Inc., 210 So.2d 259 (Fla. App. 1968) (citing FLA. §120.30, the section permitting declaratory judgment as to the validity of any agency rule).

<sup>165</sup> Antoine v. Fletcher, 307 S.W.2d 898 (Mo. App. 1957).

<sup>166</sup> Allen v. Graham, 8 Ariz. App. 336, 446 P.2d 240 (1968).

<sup>167</sup> Bank of Wheeling v. Morris Plan Bank & Trust Co., 183 S.E.2d 692 (W. Va. 1971).

<sup>168</sup> New Eng. Tel. & T. Co. v. Fascio, 105 R.I. 711, 254 A.2d 758 (1969).

<sup>169</sup> Allied Theatres of New Eng., Inc. v. Commissioner of Labor & Indus., 338 Mass. 609, 156 N.E.2d 424 (1959).

<sup>170</sup> Zigmond v. Civil Serv. Comm'n, 186 S.E.2d 696 (W. Va. 1972).

As noted above, most of the administrative procedure acts in effect separate the procedures for judicial review of rule making orders from the procedures to be followed after a decision has been rendered in an adjudicated case. The requirements of standing differ principally in accordance with this statutory design and will be considered separately.

### *Rule Making*

The rule making provision most commonly found in state administrative procedure acts incorporates the concept of legal wrong.<sup>171</sup> It requires that the person seeking judicial review of an agency rule making order must allege that the rule in its final form or in its application impairs or interferes with or threatens to impair or interfere with the legal rights or privileges of the plaintiff.<sup>172</sup> Failure to allege such interference or threatened injury has been held to deny the plaintiff the standing necessary to contest the agency rule under attack.<sup>173</sup> A few statutes broaden the requirement somewhat by permitting judicial review if the rule or its application interferes with or threatens to interfere with the right, privileges, or *interests* of the complaining party.<sup>174</sup>

Where more specific language is found, a few statutes require the person seeking judicial review to be an "interested person,"<sup>175</sup> a "person affected,"<sup>176</sup> or a "person adversely affected."<sup>177</sup> A California court has construed an "interested person" to be one with a direct and not merely a consequential interest in the litigation.<sup>178</sup> Once qualified, an "interested person" has the consequent right to obtain judicial declaration of the validity of any agency rule or standard of general application.<sup>179</sup>

A person "adversely affected," one with legal standing to attack an agency rule, has been held to be one amenable to and controlled by the specific rule who objects to it as placing him in an unfavorable position relative to that which he enjoyed prior to the imple-

<sup>171</sup> *Portwood v. Falls City Brew. Co.*, 318 S.W.2d 535 (Ky. 1958).

<sup>172</sup> D.C. §1-1510; GA. §3A-111; IDAHO §67-5207; MD. Art. 41 §245; MINN. §15.0416; MONT. §82-4219; NEB. §84-911; NEV. §233B.110; OKLA. tit. 75, §306; R.I. 42-35-7; S.D. §1-26-14; VT. tit. 3, §807; WASH. §34.04.070; W. VA. §29A-4-2; WIS. §227.05.

<sup>173</sup> *Basiliko v. Government of District of Columbia*, 283 A.2d 816 (D.C. App. 1971).

<sup>174</sup> ARK. §5-705; KAN. §77-434; N.M. §4-32-8(A); ORE. §183.400.

<sup>175</sup> ALAS. §44.62.300; CAL. GOV'T. CODE §11440; HAWAII §91-7(b); W. VA. §29A-4-2.

<sup>176</sup> ARIZ. §44-1007; FLA. §120.30(1).

<sup>177</sup> OHIO §119.11.

<sup>178</sup> *Associated Boat Indus. of No. Cal. v. Marshall*, 104 Cal.App.2d 21, 230 P.2d 379 (1951).

<sup>179</sup> *Bess v. Park*, 132 Cal.App.2d 49, 281 P.2d 556 (1955); see generally, Hutchinson, *Judicial Review of Administrative Rule Making*, 15 HAST.L.J. 272 (1964).

mentation of the new rule.<sup>180</sup> Alternatively, one is "adversely affected" within the meaning of the statute if enforcement of the rule would result in gross injustice.<sup>181</sup>

Although rule making provisions requiring the finality of the administrative order promulgating the new rule and the doctrine of exhaustion of all administrative remedies are more prevalent in the adjudicatory sections,<sup>182</sup> it has been held that the necessity for a final agency order is implicit before judicial review of rule making is available.<sup>183</sup> Several courts, while generally adhering to the concept of exhaustion of all remedies provided within the agency framework as a condition precedent to judicial review,<sup>184</sup> do not demand strict observance of the doctrine when to do so would result in a useless effort<sup>185</sup> or when no adequate remedy is available thereby.<sup>186</sup> As a corollary to this doctrine, only a few of the statutes require that the plaintiff request a declaratory ruling from the particular agency first as a condition to the right to seek judicial review.<sup>187</sup> In Maine alone, the contestant must first seek and obtain a declaratory ruling from a specially appointed hearing commission.<sup>188</sup>

### *Adjudicatory*

The greater portion of the current administrative procedure statutes confers legal standing to obtain judicial review of an adjudicated case upon any "person aggrieved" by the agency's order or decision.<sup>189</sup> A person has been held to be "aggrieved" when an order adversely affects in some substantial manner some personal or property right of the plaintiff.<sup>190</sup> The aggrievement is most likely

<sup>180</sup> *Columbus Green Cabs, Inc. v. Board of Rev.*, 88 Ohio L.Abs. 107, 184 N.E.2d 237 (1961).

<sup>181</sup> *Mastroianni v. Board of Liq. Control*, 98 Ohio App. 500, 130 N.E.2d 380 (1954).

<sup>182</sup> GA. §3A-120(a); MICH. §24.301; MO. §536.100; MONT. §82-4216; R.I. §42-35-15(a); S.D. §1-26-30; VT. tit. 3, §815; WYO. §9-276.32.

<sup>183</sup> *Powell v. Board of Pub. Instr. of Levy County*, 229 So.2d 308 (Fla. App. 1969).

<sup>184</sup> *Parshay v. Buchoe*, 30 Mich.App. 556, 186 N.W.2d 859 (1971).

<sup>185</sup> *Welfare Emp. Union v. Michigan Civ. Serv. Comm'n.*, 28 Mich.App. 343, 184 N.W.2d 247 (1970).

<sup>186</sup> *Schwall v. Dearborn*, 31 Mich.App. 169, 187 N.W.2d 543 (1971).

<sup>187</sup> D.C. §1-1508; KAN. §77-434; LA. §49:963; MICH. §24.264.

<sup>188</sup> ME. tit. 5, §2402.

<sup>189</sup> D.C. §1-1510; GA. §3A-120(a); HAWAII §91-14(a); IDAHO §67-5215(a); IND. §63-3014; LA. §49:964; ME. tit. 5, §2451; MASS. ch. 30A, §14; MICH. §24.301; MINN. §15.0424; MO. §536.100; MONT. §82-4216; NEB. §84.917(1); OHIO §119.12 OKLA. tit. 75, §318(1); ORE. §183.480(1); PA. tit. 71, §1710.41; R.I. §42-35-15(a); S.D. §1-26-30; VT. tit. 3, §815; WASH. §34.04.130(1); WIS. §227.16; WYO. §9-276.32.

<sup>190</sup> *In re Getsug*, 290 Minn. 110, 186 N.W.2d 686 (1971); *Buffi v. Ferri*, 259 A.2d 847 (R.I. 1969).

to occur where two or more persons seek mutually exclusive privileges, as in the case of licenses, where the party denied the requested privilege is directly affected by the agency's decision.<sup>191</sup>

The agency itself has been held not to fall within the statutory meaning of "aggrieved" where it seeks to appeal the order of the reviewing court.<sup>192</sup> If, however, the public has an interest in the issue which extends beyond the immediate interests of the parties involved, the agency has been found to have standing sufficient to appeal an adverse order of the reviewing court even though not technically an "aggrieved person" within the meaning of the statute.<sup>193</sup>

A few of the statutes specifically require that the person seeking judicial relief must have been a party to the original proceedings before the administrative agency rendering the decision.<sup>194</sup> Still others confer legal standing upon those "adversely affected" by an agency's decision.<sup>195</sup> Often, the "adversely affected" category of permissible plaintiffs is an alternative to that of those "aggrieved."<sup>196</sup> A person or party "affected" has been construed to be one who has appeared before the agency during the proceedings prior to decision or one given legal notice of such proceedings.<sup>197</sup>

The finality of the order or decision rendered by the agency in an adjudicated case is a common prerequisite to obtaining judicial redress in many of the statutes.<sup>198</sup> A final decision in a contested case has been statutorily defined as "one which has become a decision of the agency either by express approval or by the failure of an aggrieved person to file exceptions thereto within a prescribed time under the agency's rules."<sup>199</sup> The decision itself must be an agency determination which serves to terminate the proceedings immediately before it.<sup>200</sup>

<sup>191</sup> *Bay State Harness Horse Racing & Breeding Ass'n., Inc. v. State Racing Comm'n.*, 342 Mass. 694, 175 N.E.2d 244 (1961).

<sup>192</sup> *Minnesota Water Res. Bd. v. Traverse County*, 287 Minn. 130, 77 N.W.2d 44 (1970).

<sup>193</sup> *Buffi v. Ferri*, 259 A.2d 847 (R.I. 1969).

<sup>194</sup> FLA. §120.31; MD. Art. 41, §255; W. VA. §29A-5-4(a).

<sup>195</sup> D.C. §1-1510; N.M. §4-32-16c; OKLA. tit. 75, §318(1); ORE. §183.480(1); W. VA. §29A-5-4(a).

<sup>196</sup> D.C. §1-1510; OKLA. tit. 75, §318(1); ORE. §183.480(1).

<sup>197</sup> *Roer v. Superior Ct. In and For Coconino County*, 4 Ariz. App. 46, 417 P.2d 559 (1966).

<sup>198</sup> ALAS. §44.62.560; ARK. §5-713(a); CAL. GOV'T. CODE §11523; HAWAII §91-14(a); IDAHO §67-5215(a); LA. §49:964; ME. tit. 5 §2451; MD. Art. 41, §255; MASS. ch. 30A, §14; MICH. §24.301; MINN. §15.0424; MO. §536.100; MONT. §82-4216; NEB. §84-917(1); NEV. §233B.130; N.J. §52:14B-12; N.D. §28-32-15; OKLA. tit. 75, §318(1); ORE. §183.480(1); R.I. §42-35-15(a); VT. tit. 3, §815; WASH. §34.04.130; W. VA. §29A-5-4(a); WIS. §227.16; WYO. §9-276.32.

<sup>199</sup> MINN. §15.0424.

<sup>200</sup> *Arizona Comm. of Agric. & Hort. v. Jones*, 91 Ariz. 183, 370 P.2d 665 (1962).

In spite of the general statutory agreement that a decision to be reviewable must be final, a few of the acts qualify this condition by permitting immediate review of a preliminary procedural or intermediate agency action or ruling if waiting until the final decision would not provide an adequate remedy.<sup>201</sup>

The exhaustion of all remedies available within the agency framework as a prerequisite to obtaining judicial review of any agency decision or ruling is expressly provided for in a number of statutes.<sup>202</sup> Even where the courts lack such express statutory conditions, it has been held that, as a general rule, all available agency remedies must be explored prior to seeking relief in the courts.<sup>203</sup> This is so unless the agency lacks subject matter jurisdiction over the proceedings in which the decision was made<sup>204</sup> or if the administrative remedy was unavailable or inadequate.<sup>205</sup>

Legal standing to obtain judicial review of administrative rules, orders, and decisions under the administrative procedure acts is intimately tied to specific statutory conditions. Even where it can be established that the plaintiff is an "aggrieved person" or an "interested person" within the particular statutory context, the requirement of finality of the contested decision and the doctrine of exhaustion of administrative remedies often serve to prohibit or delay access to the judiciary.

### Scope of Judicial Review

The majority of jurisdictions surveyed specifically provide that judicial review of administrative action may only determine whether substantial rights of the appellant have been prejudiced by the agency during its procedures and/or in the issuance of its order, decision, or findings.<sup>206</sup> Two states, Connecticut and Kentucky, list no specific statutory authority for judicial review of administrative action. In Vermont, review of administrative action may be had as in the case of any county court decision.<sup>207</sup> Iowa, while having no

<sup>201</sup> GA. §3A-120(a); MICH. §24.301; R.I. §42-35-15(a); S.D. §1-26-30.

<sup>202</sup> GA. §3A-120(a); MICH. §24.301; MO. §536.100; MONT. §82-4216; R.I. §42-35-15(a); S.D. §1-26-30; VT. tit. 3, §815; WYO. §9-276.32.

<sup>203</sup> *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 183 S.E.2d 692 (W. Va. 1971).

<sup>204</sup> *Los Angeles County v. Department of Soc. Wel.*, 41 Cal.2d 455, 260 P.2d 41 (1953).

<sup>205</sup> *Martino v. Concord Comm. Hosp. Dist.*, 233 Cal. App.2d 57, 43 Cal. Rptr. 255, (1965).

<sup>206</sup> ALAS. §44.62.570; ARIZ. §12-911; ARK. §5-713(h); CAL. CIV. PRO. CODE §1094.5; COLO. §3-16; D.C. §1-1510; FLA. §120.31(2); GA. §3A-120(h); HAWAII §91.14(g); IDAHO §67-5215(g); ILL. §110-275; IND. §68-3018; KAN. §77-434; LA. §49-964; ME. tit. 5, §2451; MD. Art. 41, §255; MASS. ch. 30A, §14(8); MICH. §24.306; MINN. §15.0425; MO. §536.140; MONT. §82-4216; NEB. §84-917(6); NEV. §23313.140(5); N.J. §52-14B9; N.M. §4-32-22; N.D. §28-32-19; OHIO §119.12; OKLA. tit. 75, §322; ORE. §183.480(7); PA. tit. 71, §1710.41; R.I. §42-35-15(g); S.D. §1-26-36; VA. §9-6.13; WASH. §34.04.130(6); W. VA. §29A-5-4(g); WIS. §227.20(1); WYO. §9-276.32(c).

<sup>207</sup> VT. RULES OF PROCEDURE 74(e).

specific statutory provision for judicial review of agency action, does provide in its common law for a trial de novo in the trial court or in an appeals court when such action is being reviewed.<sup>208</sup>

The substantive rights which the court is allowed to examine upon review are substantially similar in all jurisdictions:

1. Did the administrative agency proceed in excess of its statutory authority or jurisdiction; did it proceed in an unlawful manner?
2. Did the administrative agency in its proceedings violate procedural due process?
3. Did the administrative agency come to its decision on a sound evidentiary basis as provided by that particular state's administrative procedure act as interpreted by common law?
4. Was the decision of the administrative agency arbitrary, capricious, or characterized by an abuse of discretion?

There is, of course, some overlap among these four classifications. If an action violates constitutional due process, it is also unlawful and without the jurisdiction of the administrative agency taking such action. If an administrative action is arbitrary or capricious, it may violate procedural due process. Therefore each of these categories must not be looked upon as existing in isolation, but all must be considered together by the reviewing court.

Because a state administrative agency is granted its authority by state statute, any action taken by such an agency which is in excess of its enabling statute is void, and the same result obtains if the administrative agency exceeds its constitutional authority, state or federal.<sup>209</sup> In every state which is allowed to review such agency decisions the reviewing court may reverse, set aside, or vacate the rule, decision, or action taken by the administrative agency.<sup>210</sup> The Wyoming Supreme Court has twice specifically looked at the jurisdiction of the administrative agency involved when deciding recent cases. In *Neel v. City of Laramie*,<sup>211</sup> the City Council

<sup>208</sup> *Buda v. Fulton*, 261 Iowa 981, 157 N.W.2d 336 (1968).

<sup>209</sup> *State ex rel. Standard Oil Co. v. Review Bd. of Indiana Employment Security Div.*, 230 Ind. 1, 101 N.E.2d 60 (1951).

<sup>210</sup> Jurisdictions in which the reviewing court may reverse the administrative agency specifically by statute: Ariz., Ark., Cal., Colo., Ga., Hawaii, Idaho, Ill., La., Me., Md., Mich., Minn., Mo., Mont., Neb., Nev., N.M., N.D., Ohio, Okla., Ore., R.I., S.D., Va., Wash., W. Va., Wis. Jurisdictions in which the reviewing court may set aside the administrative agency decision specifically by statute: Alas., Cal., Colo., D.C., Ind., Okla., Mass., Mich., N.M., Pa. Jurisdictions in which the reviewing court may vacate the administrative agency decision specifically by statute: Kan., Ohio, W. Va.

<sup>211</sup> 488 P.2d 1036 (Wyo. 1971).

of Laramie, Wyoming was originally enjoined from building a bridge across from plaintiff's property, but the injunction was later dissolved by the lower court because the administrative agency had complied with all statutory procedures. The Wyoming Supreme Court affirmed, partly because the plaintiff had not shown that the agency in its action was in excess of the statutory authority which allowed it to build such bridges. In so holding, the court relied on the Wyoming administrative procedure act.<sup>212</sup> In *King v. White*,<sup>213</sup> another Wyoming decision, the appellee was the assignee of a lease of real property. The Land Board denied appellant payment for water rights which the agency took on the property in question. The lower court reversed the Land Board, but the Wyoming Supreme Court reversed the lower court, affirming the Board's decision. In citing the Wyoming administrative procedure act<sup>214</sup> the court held in part that the Land Board had been acting within its statutory jurisdiction in denying the appellee payment.

Prior to the passage of state administrative procedure acts it was held that the courts had a limited right to ascertain whether the requirements of procedural due process had been met by the administrative agency in the latter's hearing.<sup>215</sup> Such an investigation could look into the jurisdiction of the agency, reasonable notice, opportunity for a fair hearing, and whether findings were supported by evidence.<sup>216</sup> More recent cases have gone into some of the specifics of due process. In *Salerno v. Board of Dental Examiners*,<sup>217</sup> the license of a dentist, Dr. Salerno, was revoked by the Board of Dental Examiners because he had unlawfully employed an unlicensed dentist to perform dental operations. Although he requested a written transcript of his hearing in order to prepare for appeal, appellant was not given such a transcript. He contended on appeal that the Board's decision should be overturned on grounds of denial of due process. The Georgia Court of Appeals affirmed the decision of the Board, partly because Dr. Salerno had failed to show that he had been prejudiced by not being furnished a copy of the transcript. Such a showing is mandatory under the Georgia administrative

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<sup>212</sup> Wyo. §9-276.32(c).

<sup>213</sup> 500 P.2d 585 (Wyo. 1972).

<sup>214</sup> Wyo. §9-276.32(c).

<sup>215</sup> *Middlesboro v. Louisville & Nashville R.R.*, 252 S.W.2d 680 (Ky. 1952); *Michigan Bell Tel. Co. v. Michigan Pub. Serv. Comm'n.*, 332 Mich. 7, 50 N.W.2d 326 (1962); *Dunaway v. Torline*, 90 Ohio App. 516, 105 N.E.2d 75 (1951), *appeal dismissed*, 156 Ohio St.

<sup>216</sup> *Russell v. Johnson*, 220 Ind. 649, 46 N.E.2d 219 (1943); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 94 N.W.2d 711 (1959).

<sup>217</sup> 119 Ga. App. 743, 168 S.E.2d 875 (1969), *cert. denied*, 119 Ga. App. 890 (1969). 535, 103 N.E.2d 576 (1952).

procedure act.<sup>218</sup> Thus it can be seen that the denial of due process may be grounds for reversal of an administrative agency decision only if such denial was prejudicial to the appellant.

In *Monahan v. Board of Trustees, County of Freemont*,<sup>219</sup> denial of due process was one ground for reversal of an agency decision. There a teacher sought review of the action of the school district Board of Trustees in terminating his employment. Due process was lacking in that the attorney for the Board acted as both presiding officer and prosecutor. As presiding officer he ruled on objections, including his own. Such denial of due process was held grounds for reversal under the Wyoming administrative procedure act.<sup>220</sup>

Most jurisdictions allow the reviewing courts to inquire into the evidentiary basis of the decision, findings, or order reached by the administrative agency. The jurisdictions differ, however, on exactly what evidentiary basis is proper.

Nineteen states and the District of Columbia provide that the agency action should be supported by "substantial evidence." Eighteen of these jurisdictions list a substantial evidence test in their administrative procedure acts;<sup>221</sup> the remaining two states, Arizona<sup>222</sup> and Illinois<sup>223</sup> have adopted the substantial evidence test in their common law. Typical substantial evidence provisions in states' administrative procedure acts provide that the reviewing court may reverse if the agency decision is not based on "substantial evidence in light of the whole record" (California, Arkansas, Arizona, Illinois, Massachusetts, Minnesota, New Mexico, District of Columbia, Wyoming, Wisconsin). Other states provide that the evidence must be "competent, material, and substantial" (Michigan, Nebraska) or "competent and substantial" (Missouri).

A different test is provided by twelve other states wherein the reviewing court may not reverse unless the decision of the administrative agency was "clearly erroneous."<sup>224</sup> Typical statutes read "clearly erroneous in view of reliable, probative, and substantial evidence on the whole record" (Georgia, Hawaii, Idaho, Louisiana, Montana, Nevada), or just "clearly erroneous" (Oklahoma, Rhode Island, Washington).

<sup>218</sup> GA. §3A-120(b).

<sup>219</sup> 486 P.2d 235 (Wyo. 1971).

<sup>220</sup> WYO. §9-276.32(c).

<sup>221</sup> Alas., Ark., Cal., D.C., Fla., Ind., Mass., Mich., Minn., Mo., Neb., N.M., N.D., Ore., Pa., Va., Wis., Wyo.

<sup>222</sup> *Talley v. Paradise Memorial Gardens, Inc.*, 107 Ariz. 585, 491 P.2d 439 (1971).

<sup>223</sup> *Lee v. Police Board of City of Chicago*, 218 N.E.2d 783 (Ill. App. 1966).

<sup>224</sup> Colo., Ga., Hawaii, Idaho, La., Md., Mont., Nev., Okla., R.I., S.D., Wash.



What is the difference between the two tests? The "clearly erroneous" test is thought to give reviewing courts broader powers of review than those courts bound by the "substantial evidence" test. As eminent an authority as Frank Cooper admits that the distinction between the two tests is blurred.<sup>225</sup> We shall attempt to sort out the similarities and differences by reviewing the case law.

Substantial evidence does not necessarily mean a preponderance of the evidence.<sup>226</sup> In the *Monahan* case,<sup>227</sup> the reviewing court found that good cause should have been shown by the School Board in terminating the teacher's employment. It was held that the Board needed substantial evidence to show such cause, and the teacher's dismissal was reversed because there was not sufficient information before the Board to constitute substantial evidence. The "substantial evidence" test was met in the *King* case,<sup>228</sup> in part by the testimony of several credible witnesses who noted what the duties of the Land Board were, and also by the enabling act itself, so as to prove jurisdiction. In *Chicago & N.W. Ry. v. Hilliard*,<sup>229</sup> the Wyoming Equalization Board assessed the railway an amount equal to a percentage of its property as a one-year tax assessment. The Wyoming Supreme Court reversed the Equalization Board on the ground that the "substantial evidence" test had not been met; the Board had computed the assessment utilizing a formula based upon the operations of a railroad other than plaintiff. The court held that the Board did not have substantial evidence before it to conclude that its indicators of economic change equally affected all operating railroads. In the Wisconsin case of *Columbus Milk Producers Co-op. v. Department of Agriculture*,<sup>230</sup> there was presentation of substantial evidence that a trade custom existed whereby the state could pay out claims against a milk co-operative utilizing for that purpose security funds paid into the state by the co-operative. This presentation of substantial evidence allowed the Wisconsin Supreme Court to pay out similar funds in the present case under the same trade custom. The court cited the Wisconsin Administrative Procedure Act as controlling the evidentiary question.<sup>231</sup>

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<sup>225</sup> 2 F. COOPER, STATE ADMINISTRATIVE LAW 733-56 (1965).

<sup>226</sup> State *ex rel.* Rockwell v. State Bd. of Educ., 213 Minn. 184, 6 N.W.2d 251 (1942).

<sup>227</sup> *Monahan v. Board of Trustees, County of Fremont*, 486 P.2d 235 (Wyo. 1971).

<sup>228</sup> *King v. White*, 500 P.2d 585 (Wyo. 1972).

<sup>229</sup> 502 P.2d 189 (Wyo. 1972).

<sup>230</sup> 48 Wis. 451, 180 N.W.2d 617 (1970).

<sup>231</sup> Wis. §227.20(1).

The "clearly erroneous" test leaves the reviewing court more latitude than the "substantial evidence" test. The court of appeals of the state of Washington adopted the United States Supreme Court definition of the "clearly erroneous" test<sup>232</sup> in a case which disallowed a claim for unemployment compensation.

Although there is evidence to support a finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.<sup>233</sup>

The Washington Supreme Court has also directly compared the two tests in scope. *Ancheta v. Daly*<sup>234</sup> involved a labor dispute in which Union A struck Employer X; Union B opposed the strike and did not walk out. Members of Union B applied for unemployment compensation when they were laid off because of the strike, but their claims were disallowed by the Employment Security Department on grounds that their lack of work was due to a work stoppage caused by a labor dispute. The Washington Supreme Court affirmed a lower court reversal of the agency decision, holding that judicial review of the decisions of administrative agencies were now governed by the Washington Administrative Procedure Act<sup>235</sup> which allowed courts the broader review of the "clearly erroneous" test rather than the narrower review of the "substantial evidence" test. South Dakota also upheld the "clearly erroneous" test set forth in its administrative procedure act<sup>236</sup> in *Application of Ed Phillips & Sons Co.*<sup>237</sup> There the state Revenue Commissioner refused to allow transfer of the stock of a wholesale liquor company because of his holding that it was not in the public interest to allow respondent to enter the wholesale liquor market. The lower court reversed the commissioner on grounds that there was not substantial evidence in the hearing before the Commissioner that the respondent was not reliable and of good moral character. The South Dakota Supreme Court reversed the lower court and affirmed the Commissioner's decision, stating that the trial court should have reversed or modified only if the agency findings were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Nine states have no specific evidentiary test outlined in their administrative procedure acts.<sup>238</sup>

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<sup>232</sup> *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

<sup>233</sup> *Tunget v. State Employment Security Dept.*, 2 Wash. App. 574, 468 P.2d 734, 737 (1970).

<sup>234</sup> 461 P.2d 531 (Wash. 1969).

<sup>235</sup> WASH. §34.04.130(6).

<sup>236</sup> S.D. §1-26-36.

<sup>237</sup> 195 N.W.2d 400, 405 (S.D. 1972).

<sup>238</sup> Conn., Iowa, Kan., Ky., Me., N.J., Ohio, Vt., W.Va.

The majority of states provide that a reviewing court may reverse the decision of an administrative agency if such decision was arbitrary, capricious, or an abuse of discretion. Nineteen jurisdictions so provide in their administrative procedure acts.<sup>239</sup> Two other states, Arizona<sup>240</sup> and Illinois,<sup>241</sup> have decided this issue in their common law, allowing reversal for these causes. Eight states allow reversal if the agency decision was arbitrary or capricious, but their administrative procedure acts make no mention of abuse of discretion.<sup>242</sup> Two other states provide for reversal if the administrative agency's decision was an abuse of discretion, but their acts make no mention of decisions which are arbitrary or capricious.<sup>243</sup> In all, thirty-one jurisdictions make some provision for reversal for one or for a combination of these factors. Ten states have no specific provision in this area.<sup>244</sup>

If the administrative agency's action is wilful and unreasoning,<sup>245</sup> it has been deemed arbitrary and capricious. Arbitrary action is the result of an unconsidered, wilful, or irrational choice.<sup>246</sup> A recent case in the federal courts, *Daly v. Volpe*,<sup>247</sup> defines an agency action as arbitrary or capricious only if it is so clearly erroneous that it has no rationally supportable basis.

In *Monahan v. Board of Trustees, County of Freemont*,<sup>248</sup> the reviewing court held that where due process was lacking, and where the administrative agency did not have sufficient information before it to fulfill the substantial evidence test, the agency's termination of the teacher's employment was arbitrary.

<sup>239</sup> Ark., Colo., D.C., Ga., Hawaii, Idaho, Ind., La., Mich., Mont., Nev., N.M., N.D., Pa., R.I., S.D., Va., W. Va., Wyo.

<sup>240</sup> Courts may grant review upon a party's sufficient showing of abuse of discretion or arbitrary or capricious action by an agency. *Peters v. Frye*, 71 Ariz. 30, 223 P.2d 176 (1950).

<sup>241</sup> Where the agency's decision was not arbitrary or capricious or against the manifest weight of the evidence, a court could not interfere with agency's discretionary authority. *Wedeborg v. Department of Regis. and Educ.*, 94 Ill. App.2d 451, 237 N.E.2d 557 (1968). Courts will not interfere with the exercise of the agency's powers unless such exercise is shown to be capricious or arbitrary. *Pickering v. Board of Educ. of Twp. High School Dist. 205*, 36 Ill.2d 568, 225 N.E.2d 1 (1967), *rev'd*, 391 U.S. 563 (1968), where the Supreme Court held that a reviewing court may examine the evidence independently and may afford little weight to the factual determinations of the Board of Education where the state courts never gave *de novo* review to the evidence.

<sup>242</sup> Md., Mass., Minn., Mo., Neb., Okla., Wash., Wis.

<sup>243</sup> Alas., Cal.

<sup>244</sup> Conn., Fla., Iowa, Kan., Ky., Me., N.J., Ohio, Ore., Vt.

<sup>245</sup> *Jabs v. State Bd. of Personnel*, 34 Wis.2d 245, 148 N.W.2d 853 (1966); *Marathon Oil Co. v. Pan American Petroleum Corp.*, 473 P.2d 575 (Wyo. 1970).

<sup>246</sup> *Robertson Trans. Co. v. Public Serv. Comm'n.*, 39 Wis.2d 653, 159 N.W.2d 636 (1968).

<sup>247</sup> 350 F.Supp. 252 (W.D. Wash. 1972).

<sup>248</sup> 486 P.2d 235 (Wyo. 1971).

An arbitrary ruling by an administrative agency may be the basis for a modification of the agency's order on review. In *Arkansas State Board of Pharmacy v. Patrick*,<sup>249</sup> the Arkansas Supreme Court affirmed the decision of the Board in punishing a pharmacist who had refilled an empty prescription container without authorization from the prescribing physician. The court held, however, that the Board's order of revocation of the pharmacist's license was arbitrary, and the order was modified to a one year suspension of his license. Abuse of discretion must be pleaded,<sup>250</sup> and the burden of proof is on the appellant to show that he was prejudiced by any abuse of discretion.<sup>251</sup>

*Possible Action by the Reviewing Court*

The alternatives left to the reviewing court, by statute, for disposition of an appealed decision of an administrative agency are illustrated by the following chart.

	AFFIRM	REVERSE	SET ASIDE	VACATE	MODIFY	REMAND
Alas. 44.62.570	X		X		X	X
Ariz. 12-911	X	X			X	X
Ark. 5-713	X	X			X	X
Cal. 1094.5 (d)	X	X	X			
Colo. 3-16-5	X		X			X
Conn. [None listed]						
D. C. 1-1510	X		X			
Fla. 120.31 (2)	X					X
Ga. 3A-120 (h)	X	X			X	X
Hawaii 9-14 (g)	X	X			X	X

<sup>249</sup> 243 Ark. 967, 423 S.W.2d 265 (1968).

<sup>250</sup> Neel v. Laramie, 488 P.2d 1056 (Wyo. 1971).

<sup>251</sup> East Camelback Homeowners Ass'n. v. Arizona Foundation for Neurology & Psychiatry, 18 Ariz. App. 121, 500 P.2d 906 (1972).

## AFFIRM REVERSE SET ASIDE VACATE MODIFY REMAND

Idaho 67-5215 (g)	X	X		X	X
Ill. 110-275	X	X			X
Ind. 63-3018	X		X		X
Iowa [None listed]					
Kan. 77-434	X				
Ky. [None listed]					
La. 49:964	X	X		X	X
Me. 2451	X	X		X	X
Md. 41-255	X	X		X	X
Mass. 30A-14 (8)	X		X	X	X
Mich. 24.306 (2)	X	X	X	X	X
Minn. 15.0425	X	X		X	X
Mo. 536.140	X	X		X	X
Mont. 82-4216	X	X		X	X
Neb. 84-917 (6)	X	X		X	X
Nev. 23313.140	X	X		X	X
N. J. [Not listed]					
N. M. 4-32-21	X	X	X		X

## AFFIRM REVERSE SET ASIDE VACATE MODIFY REMAND

N. D.					
28-32-19	X	X		X	
Ohio					
119.12	X	X	X	X	X
Okla.					
75-322	X	X	X	X	X
Ore.					
183.480 (7)	X	X			X
Pa.					
71-1710.44	X		X	X	X
R. I.					
42-35-15	X	X		X	X
S. D.					
1-26-36	X	X		X	X
Vt.					
VRCP 74(e)	<i>As In Any Usual Case Before a County Court</i>				
Va.					
9-6.13 (g)	X	X		X	X
Wash.					
34.04.130 (b)	X	X			X
W. Va.					
29A-5-4 (g)	X	X	X	X	X
Wis.					
227.20 (1)	X	X		X	
Wyo.					
[None listed]					

**Further Judicial Appeal**

While some jurisdictions have no express provision for further judicial appeal,<sup>252</sup> most states provide that further appeal may be taken as in other civil cases.<sup>253</sup> Indiana takes this approach one step

<sup>252</sup> Twelve of the jurisdictions considered have administrative procedure statutes with no express provision for further judicial appeal: Ark., Colo., Conn., D.C., Fla., Iowa., Kan., Ky., Mich., N.J., N.M., and Ohio.

<sup>253</sup> ALAS. §44.62.560; IDAHO §67-5216; LA. §49:965; ME. tit. 5, §2451; MD. Art. 41, §256; MINN. §15.0426; MO. §536.140; MONT. §82-4217; NEB. §84-918; NEV. §233B.150; OKLA. tit. 75, §323; PA. tit. 71, §1710.47; S.D. §1-26-37; VA. §9-6.14; W. VA. §29A-6-1; WYO. §9-276.33.

further by stipulating that the appeal may not be prosecuted unless notice of the appellant's intention to appeal is filed with the appellate court within fifteen days of the date of the judgment and an appeal bond is posted.<sup>254</sup>

Other varieties of provision for further judicial appeal exist: two states provide for further judicial appeal in accordance with their respective rules of civil procedure;<sup>255</sup> two states provide for further appeal in the same manner as in equity suits;<sup>256</sup> two states provide for such appeal, at the appellate court's discretion, by way of certiorari;<sup>257</sup> North Dakota authorizes further judicial appeal in its Supreme Court in the same manner as any case tried without a jury provided such appeal is prosecuted within three months after the service of the notice of entry of judgment in the district court;<sup>258</sup> Georgia simply provides for further review as provided by law;<sup>259</sup> Illinois merely states that further review may be had in accordance with its state constitution;<sup>260</sup> and finally, three states provide for further appeal by simply designating which court is the proper forum for such appeal.<sup>261</sup>

The fact that further judicial review is provided in the majority of jurisdictions renders most of the differences among the state statutes involving further judicial appeal relatively unimportant in that such review should presumably satisfy the basic elements of fairness and procedural due process. The interesting fact is that ten jurisdictions have no provision whatsoever for such review. However, where a state's administrative procedure act does not specifically preclude such further review and does not indicate a legislative intent to withhold further judicial review, an appropriate appellate court may be held to have jurisdiction under the state's general statutes relating to appeals.<sup>262</sup>

### Liability of Administrative Officials

Administrative procedure legislation among the states is unanimously silent regarding the civil or criminal liability of an administrative agency official for his malfeasance or nonfeasance in the

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<sup>254</sup> IND. §63-3018.

<sup>255</sup> CAL. C.V. PRO. CODE §1094.5; HAWAII §91-15.

<sup>256</sup> MASS. ch. 30A §15; ORE. §183.480.

<sup>257</sup> ARIZ. §12-913; R.I. §42-35-16.

<sup>258</sup> N.D. §28-32-21.

<sup>259</sup> GA. §3A-121.

<sup>260</sup> ILL. ch. 110, §276.

<sup>261</sup> VT. tit. 3 §815; WASH. §34.04.130; WIS. §227.33.

<sup>262</sup> 2 Am. Jur.2d *Administrative Law* §769 (1962). The question of legislative intent of a particular state relating to the absence of an administrative procedure statute provision for further judicial review is beyond the scope of this note.

course of making an administrative determination.<sup>263</sup> The absence of a statutory provision imposing liability on an administrative official does not necessarily indicate that such official will not be held liable for his malfeasance or nonfeasance, because the common law may impose such liability.<sup>264</sup> The general common law rule is that a public official will not be held personally liable for his error or mistake in making an adjudicatory determination so long as he was acting within his jurisdiction and in good faith.<sup>265</sup>

Although California's administrative procedure legislation provides for the imposition of personal liability upon an agency official for his malfeasance,<sup>266</sup> such malfeasance is not of the type referred to immediately above in that to be subject to California's statutory imposition of liability of a fine and imprisonment, the malfeasance must be the intentional refusal to obey a court mandate rather than malfeasance in the course of making an administrative determination.<sup>267</sup>

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<sup>263</sup> Although no specific provision was included in any of the administrative procedure statutes reviewed, there may be other vehicles through which liabilities on officials may be imposed. Such other vehicles are generally beyond the scope of this note.

<sup>264</sup> 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 641 (1965).

<sup>265</sup> 2 Am. Jur. 2d *Administrative Law* §799 (1962).

<sup>266</sup> CAL. CIV. PRO. CODE §1094.8.

<sup>267</sup> *Id.*

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